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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statutory provision that allows a claimant to petition the Customs Service for discretionary remission or mitigation of penalties for violations of the customs laws creates a property interest subject to the requirements of the Due Process Clause of the Fifth Amendment.

2. Whether, assuming that due process requirements apply to the remission decision, they impose some obligation of prompt disposition that could be violated by the mere passage of 36 days from the filing of a petition to its disposition.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional provision and statutes involved	2
Statement	3
Reasons for granting the petition	10
Conclusion	24
Appendix A	1a
Appendix B	13a
Appendix C	15a
Appendix D	33a
Appendix E	35a
Appendix F	41a

TABLE OF AUTHORITIES

Cases:

Armstrong v. *Manzo*, 380 U.S. 545	14
Barker v. *Wingo*, 407 U.S. 514	9, 15, 16, 17, 19, 20
Board of Regents v. *Roth*, 408 U.S. 564	11
Connecticut Board of Pardons v. *Dumschat*, 452 U.S. 458	11, 12
Greenholtz v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1	11, 13
Ivers v. *United States*, 581 F.2d 1362	15
Jago v. *Van Curen*, 454 U.S. 14	12
Lee v. *Thornton*, 538 F.2d 27	8
Mathews v. *Eldridge*, 424 U.S. 319	8, 14, 23
Meachum v. *Fano*, 427 U.S. 215	11
Montanye v. *Haymes*, 427 U.S. 236	11
Morrissey v. *Brewer*, 408 U.S. 471	14
Olim v. *Wakinekona*, 461 U.S. 238	11-12

Cases—Continued: Page

United States v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 ..... 8, 9, 10, 13, 15, 16, 19, 23, 24
United States v. *Elorduy*, 612 F.2d 986 17
United States v. *Lovasco*, 431 U.S. 783 16
United States v. *MacDonald*, 456 U.S. 1 17
United States v. *Morris*, 23 U.S. (10 Wheat.) 246 12
United States v. *Nance*, 666 F.2d 353, cert. denied, 456 U.S. 918 17
United States v. *One 1961 Cadillac*, 337 F.2d 730 13
United States v. *One 1970 Buick Riviera*, 463 F.2d 1168, cert. denied, 409 U.S. 980 13
United States v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233 13
United States v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 13
United States v. *Stowell*, 133 U.S. 1 15
United States v. *Struyf*, 701 F.2d 875 16

Constitution, statutes, regulations and rule:

U.S. Const.:
Amend. V (Due Process Clause) 2, 10, 11, 12, 13
Amend. VI (Speedy Trial Clause) 16
Act of May 26, 1790, ch. 12, 1 Stat. 122 *et seq*. 12
19 U.S.C. 1497 ..... 2, 5, 7
19 U.S.C. 1602 5
19 U.S.C. 1603 23
19 U.S.C. 1614 5
19 U.S.C. 1618 ..... 2, 6, 12
19 C.F.R.:
Section 162.43 5
Section 162.44(b) 5
Section 171.21 6
Fed. R. Crim. P. 41(e) 17

Miscellaneous:

H.R. Rep. 1429, 75th Cong., 1st Sess. (1937) 23
S. Rep. 1465, 75th Cong., 3d Sess. (1938) 23
U.S. Customs Service, *Fines, Penalties and Forfeitures Handbook* (rev. 1979) 21

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 729 F.2d 657. The previous opinion of the court of appeals (App., *infra*, 15a-32a) is reported at 660 F.2d 1319.[1] The findings of fact

[1] That opinion as reported does not contain the modifications that the court of appeals made to its decision in denying the government's petition for rehearing. See App., *infra*, 33a-34a.

and conclusions of law of the district court (App., *infra*, 35a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1984. A petition for rehearing was denied on September 18, 1984 (App., *infra*, 13a-14a). On December 6, 1984, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to January 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the

> Treasury if under the customs laws * * * or under the navigation laws, * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

In March or April 1974, respondent, an automobile dealer, purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada, with the intention of bringing it into the United States (Tr. 13, 20-21). For this purpose, respondent had the automobile registered in the State of California and obtained California license plates for it (App., *infra*, 36a). On January 20, 1975, respondent arrived in Vancouver to take possession of the vehicle and obtained from Canadian Customs a release form authorizing him to transport it through Canada to the United States-Canadian border in British Columbia. Canadian Customs officers instructed him to deliver the form to the Canadian Customs border station before leaving Canada. Tr. 27-30, 151; App., *infra*, 16a-17a, 36a.

Later that day, respondent drove south toward the United States border. After failing to stop first at the Canadian Customs station to surrender the release form as he had been instructed, he arrived at the United States border checkpoint at Blaine, Washing-

ton, at approximately 5:00 p.m. Tr. 31-32; App., *infra*, 17a, 36a-37a.[2]

Earlier that day Canadian Customs officials had alerted United States customs officers at the Blaine checkpoint that a Jaguar Panther automobile had been off-loaded at the Vancouver ocean terminal and might be driven across the border into the United States (Tr. 110-111). As respondent drove up to the Customs primary inspection point, the inspector on duty recognized that the automobile matched the description given by the Canadians. After the inspector inquired whether respondent was a United States citizen and how long he had been outside the United States, he asked whether respondent had purchased or acquired anything outside the United States (Tr. 113). When respondent answered negatively, the inspector asked him whether he had anything to declare to Customs, "to make sure there was no mistake about what information was needed" (Tr. 114). Respondent indicated that the only property in his possession was his personal belongings (*ibid.*). App., *infra*, 17a, 37a.[3]

Following this exchange, the inspector directed respondent to park his car and to enter the Customs station. He then referred the case to his supervisor,

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[2] Respondent testified that he inadvertently had passed the Canadian Customs building because of poor visibility and inadequate directions (Tr. 31-32; App., *infra*, 17a).

[3] During the hearing, respondent conceded that he knew he had to declare his automobile at the United States Customs station, but he claimed that he planned to do that only after he stopped at the Canadian Customs station. He testified that he understood the Customs inspector's question to relate exclusively to purchases or acquisitions made in Canada and that the inquiry thus did not refer to his automobile, since it had been purchased in Switzerland. Tr. 38-40.

giving as the reason for additional inquiry respondent's failure to declare the vehicle. Tr. 115-116. When the supervisory inspector asked respondent why he had failed to declare his automobile, respondent answered that he did not think he was required to. The officer then informed him that the vehicle was being seized because of his failure to declare it. Tr. 144-145, 148-149; App., *infra*, 17a-18a. See 19 U.S.C. 1497, 1602.

The supervisor then completed the necessary seizure documents and assisted respondent in preparing a "Petition for Remission or Mitigation of Forfeitures and Penalties Incurred." In his very brief, handwritten petition, respondent stated that he "had no intention of avoiding U.S. Customs duties" and explained that he had mistakenly arrived at the United States Customs office after attempting to locate Canadian Customs for the purpose of surrendering his Canadian release form. C.A. App. 10; App., *infra*, 18a.[4] Upon completion of the necessary documents, the supervisor explained that respondent could obtain the release of his vehicle by posting its value[5] and arranged for respondent to be transportated to a local hotel (Tr. 51, 155-159).

2. Two weeks later, on February 3, 1975, respondent posted a bond for $24,500, the appraised value of his car, and Customs returned the vehicle to him

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[4] "C.A. App." refers to the excerpt of record filed with the court of appeals.

[5] Customs officials have discretion to release a seized vehicle to a person claiming a "substantial interest therein" upon payment of the value of the vehicle. 19 U.S.C. 1614. The payment serves as a bond to cover any penalty assessed for failure to make the declaration required by law. See 19 C.F.R. 162.43, 162.44(b).

(App., *infra*, 19a). On February 12, 1975, respondent filed with Customs a "Supplement to the Petition for Remission" in which he provided a detailed account of the circumstances surrounding his attempt to bring the automobile into this country. Respondent alleged for the first time that the customs inspector had never inquired whether respondent had anything to declare; he also repeated his earlier claim that he fully intended to pay the duty on the automobile (C.A. App. 11-14). Petitioner did not, however, request that his petition be acted upon with expedition.

On February 25, 1975, the Seattle District Director of the Customs Service[6] informed respondent that, upon consideration of his petition and the reported facts, the penalty for failing to declare the car was being remitted to $3,600. The District Director therefore refunded $20,900 to respondent (C.A. App. 15). Respondent obtained an administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment (C.A. App. 17). App., *infra*, 19a.

2. Respondent then filed the instant suit in the United States District Court for the Central District of California, seeking, inter alia, return of the $3,600 penalty and a declaration that the seizure of his automobile and the imposition of a penalty were unlawful

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[6] By statute, the Secretary of the Treasury is authorized to act on petitions for remission or mitigation. 19 U.S.C. 1618. This authority has been delegated to District Directors of the Customs Service in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. 171.21. The estimated value of respondent's car, $24,500, thus fell within the District Director's authority to act on petitions for remission or mitigation.

(C.A. App. 2-9).[7] After an evidentiary hearing, the district court found that respondent had violated 19 U.S.C. 1497 by failing to declare his automobile and that, accordingly, the seizure of the vehicle by Customs was proper and the automobile was subject to forfeiture (App., *infra*, 39a). The district court also found that the remission and mitigation procedures followed by Customs "were proper" (*ibid.*).

3. The court of appeals affirmed the district court's determination that the seizure of respondent's vehicle was proper, finding that "[t]he record fully supports the district court's conclusion that [respondent] attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so." App., *infra*, 20a. It reversed, however, the district court's holding that the procedures followed by Customs in acting upon respondent's petition for mitigation were proper. Proceeding from the premise that in cases involving the seizure of an automobile "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618" (App., *infra*, 30a), it held that "[t]he [one month] delay in processing [respondent's] petition for remission or mitigation * * * violated his due process right to prompt con-

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[7] The government filed a contingent counterclaim seeking recovery of the full $24,500 in accordance with 19 U.S.C. 1497, in the event the district court found the administrative mitigation proceedings invalid. The counterclaim was based upon the theory that, if the administrative settlement were found to be invalid, the government was free to seek forfeiture of the full value of the vehicle as a penalty for failing to declare it, just as if no administrative relief had ever been granted (C.A. App. 22-23, 32). The district court, having entered a judgment in favor of the government, accordingly denied the contingent counterclaim (App., *infra*, 39a).

sideration of his claim" (*id.* at 32a).[8] The court then went on to articulate specific standards to be used by Customs prospectively to assure the prompt processing of petitions for administrative relief. The court stated that Customs should, unless "unusual circumstances" require a brief delay, act on all petitions within 24 hours of receipt and provide the claimant an opportunity to make an oral appearance to argue his claim (*id.* at 31a-32a & n.16, 33a-34a).

4. The government sought certiorari, and this Court granted the petition and vacated and remanded for reconsideration in light of *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983). 462 U.S. 1101 (1983). On remand, the court of appeals adhered in substantial part to its previous decision (App., *infra*, 1a-12a). The court found that this Court's decision in *$8,850* "reinforce[d]" its view that due process rights attach to the processing of the petition for remission, and therefore the court reaffirmed its earlier holding that due process requires Customs to dispose of those petitions promptly (*id.* at 7a).

With respect to the standards it had established for considering petitions for remission or mitigation, the

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[8] The court of appeals relied heavily upon the decision of the Second Circuit in *Lee* v. *Thornton*, 538 F.2d 27 (1976), in concluding that due process requires prompt disposition by Customs of administrative petitions for remission or mitigation of vehicle forfeitures. In *Lee*, the court, relying upon the balancing analysis in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that when vehicles are seized for forfeiture, action on petitions for remission or mitigation should be required within 24 hours, unless a hearing on probable cause is requested by the claimant, in which event the hearing should be conducted within 72 hours of the seizure. 538 F.2d at 33.

court of appeals drew back from the 24-hour limit that it had imposed, noting that *$8,850* had indicated that a due process inquiry should be a flexible one that depends on the facts of a particular case (App., *infra*, 8a). Relying on *$8,850*, the court adopted the four-factor analysis of *Barker* v. *Wingo*, 407 U.S. 514 (1972), as the appropriate framework for considering a claim of violation of due process through delay in processing a petition for remission or mitigation (App., *infra*, 8a-9a & n.6).

The court of appeals remanded the case to the district court to consider those factors, but it deemed it appropriate to make several observations to assist the district court. Stating that "the propriety of the delay may turn to a great extent upon the nature of the item that has been seized," the court of appeals noted the "special hardships" imposed on persons deprived of their automobiles, which are "particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point" (App., *infra*, 10a). Although the reasons for the delay were not previously at issue in the district court, the court of appeals also stated that the record indicated "no obvious reason" for the one-month delay and that it "appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition" (*id.* at 11a). With respect to the third *Barker* factor, the court noted that respondent had promptly filed a petition for remission, "which seems a sufficient assertion of his rights" (*ibid.*). Finally, the court noted that the prejudice to the claimant from the delay could include "expenses resulting from a seizure of his vehicle, sudden disruption of travel plans [and] inconvenience" (*id.* at 12a).

REASONS FOR GRANTING THE PETITION

This case presents questions of both practical and theoretical importance concerning the Due Process Clause of the Fifth Amendment. The decision below finds a due process right in a purely discretionary remedy that, as a matter of administrative grace, may relieve an individual who violates the Customs laws from the civil penalty imposed by law for his conduct. Moreover, the due process restraints imposed by the decision below are substantial ones. In a real sense, the court of appeals here has turned normal due process concepts on their head by apparently requiring disposition of remission petitions with such speed that the agency's ability to make fair, accurate, and reasoned decisions will be sustantially impaired. In addition, the holding below flies in the face of this Court's recent decision in *$8,850* by finding that a 36-day delay in ruling on a petition for remission will ordinarily violate due process, even though *$8,850* held that an 18-month delay in holding judicial forfeiture proceedings (conceded by the court of appeals to call for stronger due process protection than this case) did not violate due process. Because the decision of the Ninth Circuit is squarely at odds with numerous decisions of this Court and because it creates significant administrative problems for Customs and potentially injures the interests of all persons whose property is seized for forfeiture in the Ninth Circuit, review by this Court is in order.

1. It is well established that the procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group:

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations.

Greenholtz v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979), citing *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976). By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a person of "liberty" or "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972).

The decisions of this Court make it clear that the government creates a property or liberty interest cognizable under the Fifth Amendment only when it binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts. See, *e.g.*, *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 462-467 (1981); *Greenholtz*, 442 U.S. at 10; *Meachum* v. *Fano*, 427 U.S. at 226; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976). Applying this analysis in *Dumschat*, 452 U.S. at 465, this Court held that a prisoner serving a life sentence had no due process liberty interest at stake in the decision whether to commute his sentence, because "[t]he [commutation] petition * * * is nothing more than an appeal for clemency. * * * In terms of the Due Process Clause, a * * * felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." (footnote omitted). See also *Olim* v. *Wakine-*

kona, 461 U.S. 238 (1983); *Jago* v. *Van Curen*, 454 U.S. 14, 20-21 (1981).

It is plain that the relief of remission or mitigation is similarly a matter of executive grace that is not designed to create any "property" interest protected by the Due Process Clause. Over 150 years ago, in *United States* v. *Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825), this Court described the Customs remission process, enacted by the First Congress, Act of May 26, 1790, ch. 12, 1 Stat. 122 *et seq.*, as a "subject submitted to [the Secretary of the Treasury's] sound discretion." Indeed, the Court's description of the remission process is very much like that of a pardon: "It presupposes, that the offence has been committed, * * * and affords relief for inadvertencies, and unintentional error." 23 U.S. (10 Wheat.) at 291.

The understanding that an administrative application for remission or mitigation invokes a wholly discretionary power and creates no entitlement in the claimant is clearly expressed in the current statute, 19 U.S.C. 1618, enacted in its present form as part of the Tariff Act of 1930. Section 1618 provides that "the Secretary of the Treasury, * * * if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture, *may* remit or mitigate the same *upon such terms and conditions as he deems reasonable and just* * * *" (emphasis added). This statute, like the sentence commutation statute considered in *Dumschat*, grants the claimant no more than the ability to petition for clemency. The decision whether to grant remission or mitigation and the proper terms

of such relief are left to the discretion of the Secretary or his designee.[9] In a manner similar to that of a state parole board, he is empowered, but not required, to remit or mitigate forfeitures upon such terms as he deems "reasonable and just" when he finds that mitigating circumstances warrant such relief. See *Greenholtz*, 442 U.S. at 7. There is thus no particular set of facts that, if shown, mandate a decision favorable to the claimant. In the absence of specific factual criteria defining entitlement to relief, remission or mitigation must be considered an act of grace to which due process protections—including any right of prompt disposition of claims respecting property interests—do not attach.[10]

2. Assuming, contrary to our previous submission, that the Due Process Clause attaches to determina-

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[9] It is well settled that the decision whether to grant petitions for remission is a wholly discretionary decision of the Executive Branch; courts lack jurisdiction to review the Secretary's action on a petition for remission or mitigation. See *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *United States* v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States* v. *One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), cert. denied, 409 U.S. 980 (1972); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964).

[10] This conclusion does not, of course, mean that an individual has no right to due process in connection with the disposition of his seized property. He is entitled to a hearing on the forfeitability of the property, and, under *$8,850*, he has due process protection against unreasonable delay in the forfeiture proceeding. If delay in processing a petition for remission or mitigation becomes inconvenient for the claimant, he may, of course, withdraw his petition and seek prompt judicial forfeiture proceedings. In any event, he retains the right to raise a due process objection to the delay in the forfeiture proceeding itself.

tions concerning petitions for remission or mitigation and that it imposes some time limits on the making of such determinations, the limitations imposed by the court of appeals' decision are far more stringent than anything that conceivably could be required by the Constitution. The result of the court's holding is that, unless a petition is decided almost immediately, every case will give rise to a triable issue of a due process violation; moreover, the court strongly suggests that, in the absence of unusual extenuating circumstances, a 36-day consideration period violates due process. This is, we respectfully submit, a wholly unreasonable result produced by an analysis seriously flawed in several respects.

a. Initially, a conclusion that some process is due in connection with the consideration of a remission petition merely poses, but does not answer, the question whether the required process encompasses a right to a speedy disposition of the petition. Due process is a "flexible" concept that "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Basically, due process guarantees that a proceeding be fair; "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). The Customs Service has established detailed procedures for the equitable processing of remission petitions (see note 18, *infra*), and respondent has not complained that he was given an inadequate opportunity to present his case here.

There is in fact no need to create a constitutional right to a speedy disposition in order to insure funda-

mental fairness in the remission context. True, the Court did recognize a due process right to a speedy judicial forfeiture proceeding in *$8,850* because the claimant is deprived of the use of the property—to which he may have a valid claim—until the forfeitability of the property is resolved. See 461 U.S. at 563-564. The administrative remission context, however, is fundamentally different from *$8,850* in this regard. The underlying premise of a remission petition is that the property is forfeitable; the claimant merely seeks to have the penalty eliminated or reduced because of mitigating factors.[11] When property is forfeitable, it becomes the government's property as of the time it is seized. See *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). Plainly, the claimant should have no constitutional right to speedy disposition of his petition when he is not being deprived of the use of his property during the pendency of the petition (because the property in question is recognized—for purposes of the administrative petition proceeding—as belonging to the government).

b. In any event, even if there were a constitutional right to speedy disposition of a remission petition and the court of appeals were correct that the claim should be analyzed under the *Barker* v. *Wingo* factors,[12] the court's application of those factors is not

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[11] If the claimant wishes to contest forfeitability, the judicial forum is the place to do so; there, the right to a reasonably prompt determination is protected.

[12] It is by no means clear that a due process claim for delay in acting on a remission petition ought to be resolved by reference to the *Barker* factors, at least in the absence of a threshold showing of prejudice caused by the delay. In the somewhat analogous area of preindictment delay, this Court

faithful to the analysis described in *$8,850* and *Barker*. First, it is clear that the time taken here to act on the petition was far too brief to give rise to any due process claim. The length of the delay under *Barker* is a factor that "triggers" consideration of the other factors. See 407 U.S. at 530. It is clear that, even in the speedy trial context, where the constitutional protection ought to be significantly stronger than here (see *$8,850*, 461 U.S. at 565 n.14), 36 days is considerably too short a period to be "presumptively prejudicial" (*Barker*, 407 U.S. at 530) and therefore trigger consideration of the other *Barker* factors for a possible speedy trial violation. See, *e.g.*, *United States* v. *Struyf*, 701 F.2d 875, 879 (11th Cir. 1983)

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has stated that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). This Court did suggest in *$8,850* that a due process claim based on delay might be possible in some circumstances in the absence of demonstrable prejudice, but, as the court of appeals itself recognized (App., *infra*, 6a-7a), the claim here is significantly different from that in *$8,850*. In *$8,850*, the claim concerned the delay in holding a judicial forfeiture proceeding, which is the final step in the legal path triggered by the seizure of forfeitable property. It therefore was logical for the Court in *$8,850* to look for guidance to cases arising under the Speedy Trial Clause, an analogous situation involving the delay in holding the final step (the trial) in the chain of judicial events triggered by an indictment. But the claim here is not analogous to a speedy trial claim; a petition for remission or mitigation is an optional, and collateral, administrative remedy that plainly is not automatically set in motion by the seizure of forfeitable property. Hence, despite *$8,850*, some showing of prejudice caused by the delay ought to be a prerequisite to a due process claim of delay in acting on a petition for mitigation, just as *Lovasco* holds that it is for preindictment delay.

(seven month delay does not trigger consideration of other *Barker* factors); *United States* v. *Nance*, 666 F.2d 353, 360 (9th Cir.), cert. denied, 456 U.S. 918 (1982) (five months); *United States* v. *Elorduy*, 612 F.2d 986, 988 (5th Cir. 1980) (six months). See also *United States* v. *MacDonald*, 456 U.S. 1, 11 (1982).

Second, the focus of the court of appeals' *Barker* analysis is completely misdirected. The court looked to the prejudice resulting from the *seizure* itself, such as the potential consequences of depriving an individual of a means of transportation for an extended period of time (see App., *infra*, 12a); but the alleged due process violation arises not from the seizure, but from a delay in processing a petition for remission. The class of cases under consideration involves vehicles as to which there is probable cause to believe that they have themselves been smuggled into the country (as here) or have been employed for the transportation of illegal drugs or other contraband. Generally, the claimant has no basis for objecting to the seizure itself.[13] The purpose of the remission process is to consider whether there are extenuating circumstances that might justify amelioration of the penalty of forfeiture. As we indicate in the discussion in point 3, this determination will often take considerable time. A person who attempts to smuggle a vehicle or contraband across the border should be held to have assumed the risk of any inconvenience that might result from its seizure. Accordingly, the hardship involved in loss of the vehicle for a period of several weeks, or even months, while a remission petition is under consideration is simply not the kind

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[13] If the lawfulness of the seizure is being disputed, the forum provided for that inquiry is a motion for return of property under Fed. R. Crim. P. 41(e).

of prejudice that activates a due process requirement of speedy disposition.[14]

Moreover, procedures exist to permit the claimant to obtain the return of his vehicle; he can post a bond in the amount of the value of the vehicle. That is what respondent did in this case, two weeks after the seizure, at which time the Jaguar was released to him. Indeed, there is nothing in the record to show why he could not have posted a bond and obtained possession of the car within a day or two had he wished to do so.[15] Moreover, it can hardly be said in this case that respondent was left stranded at the border (see App., *infra*, 10a). Rather, the Customs agent arranged for transportation for respondent to the nearest town, from which respondent arranged to fly home in his private plane that was waiting in Seattle (Tr. 51-52). In short, the inconvenience suf-

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[14] The error of the court of appeals' decision may perhaps most clearly be demonstrated by considering what the analogous rule would be as applied to seizure of the person—an event surely as inconvenient to the individual as the seizure of his automobile. Under such a rule, an individual who had been arrested on probable cause to believe he had committed a crime and who asked the prosecutor to consider a plea bargain or dismissal of all charges could not be prosecuted at all if the prosecutor failed to give a final response to such a proposal within the short time frame suggested by the decision below. No one would seriously propose such a rule in the case of arrests, and we are at a loss to understand why it should apply to seizures of property.

[15] Respondent stated to the Customs officer at the time of the seizure that it would be "no problem" for him to obtain the funds to secure release of the car (Tr. 157, 159). Moreover, respondent testified that he was familiar with Customs "informal entry" procedures that would have required him to post a bond in the amount of the value of the car in order to be allowed to go on his way (Tr. 67).

fered by respondent when his effort to escape paying duty on a $24,500 foreign automobile was thwarted was fairly ascribable to his own misdeed and not to any unfairness in the processing of his petition for administrative clemency.

Examined in the proper light, *i.e.*, focusing on the delay in processing the petition, the *Barker* v. *Wingo* factors cannot possibly be found to support a due process claim in this case. As noted earlier, the length of the delay was entirely too short to suggest any constitutional deficiency. The short delay was almost certainly ascribable to the need to investigate the contentions raised by and assess the merit of respondent's petition for remission. With respect to the third *Barker* factor, while the filing of the petition for remission at the time of seizure may have indicated respondent's intent to avoid, if possible, forfeiture of the total value of the car, it can hardly be construed as an assertion of his "right" to consideration of his petition in less than 36 days.[16] Indeed, respondent's filing of a detailed supplemental petition, less than two weeks before his petition was finally acted upon, plainly belies such an intent. Finally, there is no suggestion how the delay in acting on the petition (as distinct from the seizure itself (see App., *infra*, 12a)) could possibly have prejudiced the claimant in the manner contemplated in *$8,850*—in his defense against the forfeiture action (see 461 U.S. at 569-570)—or, indeed, in any other way. In short, the court of appeals' remand order, with its sugges-

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[16] Since the due process claim involved here can arise only if a petition for remission or mitigation is filed, the court of appeals' analysis completely eliminates this *Barker* factor from the equation by weighing it in favor of the claimant in every case.

tion that the district court could find a due process violation because of the 36-day consideration period in this case, is gravely flawed.[17]

3. The decision of the court of appeals also ordains a wholly irrational system for processing remission petitions that will have deleterious practical effects well beyond the small sum of money at stake in this case. By treating routine delay in processing a remission petition as a due process violation barring imposition of any penalty for smuggling, the decision, if allowed to stand, will inject undue haste into the administrative process that will harm not only the agency but also the interests of claimants generally. In order to give adequate and reasoned consideration to a claimant's petition, Customs must often investigate the basis for the factual allegations in the petition and make other inquiries, which may concern events and circumstances beyond those at the site of the seizure or submission of the petition. As detailed in an affidavit executed by the Director of the Entry Procedures and Penalties Division, Office of Regulations and Rulings, United States Customs Service,

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[17] Indeed, it might fairly be said that the court of appeals has distilled *Barker* into a single factor test for delays in acting on remission petitions. Since, under the court of appeals' analysis, even a very short delay triggers the inquiry, the mere filing of the petition satisfies the demand requirement, and inconvenience caused by the seizure is treated as prejudice caused by the delay, it would appear that three of the *Barker* factors will be weighed in favor of the claimant in almost every case of this kind. The due process question will turn entirely on the reasons for the delay. If Customs can show that, under the circumstances, it could not possibly have acted on the petition more quickly, the due process claim will be denied. Otherwise, the claim will be granted and the forfeiture invalidated.

which was filed with the government's rehearing petition (App., *infra*, 41a-50a), most decisions on petitions for remission normally take more than 30 days and, in a large number of cases, at least three to six months is needed for Customs to collect the information necessary to make an informed decision even if it gives high priority to an application over other pending matters (App., *infra*, 45a, 47a, 49a).[18]

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[18] The Director's affidavit explains that there are numerous factors that are considered in deciding the extent to which relief should be granted: *e.g.*, whether the violation occurs in connection with a commercial shipment or an importation for personal use; whether the petitioner has a previous record of Customs or criminal violations; whether the violation was negligent or willful; and the validity of a claim that forfeiture would create an extraordinary financial hardship. App., *infra*, 46a-47a. Both time and manpower are required to conduct the necessary investigations.

Moreover, the agency has established formal procedures for processing petitions for remission of forfeiture, which help assure fair and equitable treatment of all petitions. These procedures, which are set forth in the United States Customs Service's *Fines, Penalties and Forfeitures Handbook* 116-119 (rev. 1979), contemplate a multi-step investigation and review process: (1) upon receipt of a petition, an "FP&F" officer examines the document to determine whether further investigation is needed; (2) if he determines that further investigation is required, he prepares a request for investigation and forwards it to the District Director; if additional investigation is not deemed necessary, he prepares a memorandum for the District Director recommending a final determination based upon guidelines and applicable precedent; (3) in cases where further investigation is deemed necessary, the District Director may refer the case to the Customs Office of Investigation, which will further investigate the allegations contained in the petition or obtain the information specified by the District Director; (4) following the investigation, the Customs investigator files a report with the District Director; (5) upon completion of the investigatory and review processes,

Indeed, the factors that necessitate more extended consideration of petitions than the court of appeals seems willing to accept are well illustrated by this case. See App., *infra*, 47a-48a. A responsible decision on respondent's petition required at a minimum an inquiry (that could potentially extend all the way to Switzerland) into respondent's ownership interest in the seized vehicle, because it was registered in the name of Grace Blote, its intended recipient (C.A. App. 11). In addition, the District Director was required to consider respondent's allegations that the Customs inspector at the Blaine, Washington, Customs station had never asked him whether he had anything to declare and that respondent lacked any intent to avoid paying his customs duty (C.A. App. 13). To evaluate these claims required at least some inquiry into respondent's background, which could not reasonably be based exclusively on respondent's self-serving statements about his reputation for veracity. If anything, Customs should be commended, not condemned, for reaching a decision on this petition in five weeks.

The court of appeals' decision that, except in unusual circumstances, 36 days is too long to consider a petition will require Customs to act in haste that will unavoidably result in a failure fully to explore and consider pertinent facts. Thus, the decision below ac-

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the District Director decides the action to be taken on the petition and advises the petitioner of the decision in a written opinion that includes a statement of the findings of fact and the reasoning on which the decision relies. For seizures valued at more than $25,000, there is an additional level of review; the final decision on the petition is made by Customs' Washington, D.C., headquarters or, if the seized items are valued at more than $100,000, by the Department of Treasury (App., *infra*, 48a-49a).

tually undermines one of the primary purposes of due process, viz., to reduce the risk of governmental error. See *Mathews* v. *Eldridge*, 424 U.S. at 335. The unrealistic time constraints will increase significantly the likelihood that the decisions on petitions will be arbitrary. Indeed, the most logical response to the decision below would be for Customs simply to deny petitions that it has not definitely decided to grant in the brief time available. In many cases, the matter would then be referred under 19 U.S.C. 1603 to the United States Attorney for the institution of judicial forfeiture proceedings.[19]

Accordingly, the decision below undermines the congressional purpose in establishing the remission and mitigation remedy, which is designed to favor an administrative, rather than judicial, resolution of claims resulting from Customs seizures. See, *e.g.*, H.R. Rep. 1429, 75th Cong., 1st Sess. 5 (1937); S. Rep. 1465, 75th Cong., 3d Sess. 11 (1938). Moreover, this result is contrary to the interests of most claimants. Usually, and this was certainly true in respondent's case, a claimant's only realistic hope of reacquiring any of his property is the remission process,

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[19] In 90% of all cases of seizure of non-contraband property, the claimant files a petition for remission or mitigation. See *$8,850*, 461 U.S. at 558. The Director's affidavit in this case states that in 95% of car seizure cases in which such petitions are filed, the case is settled administratively without the necessity of instituting forfeiture proceedings: *i.e.*, the vehicle is returned upon payment of a mitigated amount (App., *infra*, 49a). If the decision below induces Customs to act on all petitions within 30 days, even when that period is insufficient to make an informed decision, many of these cases (perhaps as many as 70% (*id.* at 49a, 50a)) that would otherwise be settled administratively will be referred for forfeiture proceedings.

and thus denial of the petition because of time constraints is rarely in his best interest. See *$8,850*, 461 U.S. at 566. Because the decision below would have a "disruptive effect" on Customs' forfeiture program (App., *infra*, 50a) and seriously disadvantage many persons affected by the program, it is important that the erroneous ruling of the court of appeals be overturned by this Court.[20]

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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JANUARY 1985

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[20] For these reasons, we urge the Court to grant certiorari even though the case has been remanded to the district court for further proceedings. Even if the United States prevails on remand, the decision of the court of appeals will remain the governing law in the Ninth Circuit, and the serious problems it creates will plague the administration of the forfeiture program until action is taken by this Court.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

On Remand from the United States Supreme Court

March 30, 1984

Before TANG and BOOCHEVER, Circuit Judges, and PRICE.* District Judge.

BOOCHEVER, Circuit Judge.

This case was remanded by the United States Supreme Court for further consideration in light of *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,*

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

—— U.S. ——, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) (hereinafter referred to as *$8,850*). The issue on remand is whether the United States Bureau of Customs (Customs) violated due process in handling an administrative petition for remission or mitigation of the forfeiture of an automobile seized at the border. In our earlier decision, we held that Customs violated John von Neumann's due process rights by failing to process von Neumann's petition for over a month after the petition was filed. *See Von Neumann v. United States*, 660 F.2d 1319, 1326 (9th Cir. 1981). After reconsideration in light of *$8,850*, we reaffirm our earlier conclusion that due process rights attach to the processing of a petition for remission. We remand to the district court, however, for determination of whether the delay violated von Neumann's due process rights.

FACTS

Our earlier decision fully explored the events surrounding the seizure of von Neumann's 1974 Jaguar Panther automobile at the United States border checkpoint of Blaine, Washington on January 20, 1974. *See* 660 F.2d at 1321-22. In brief, von Neumann shipped the automobile from Switzerland, where he had purchased it, to Vancouver, Canada, where he obtained a release from Canadian authorities to transport the automobile to the United States. At the Blaine checkpoint, von Neumann failed to declare the automobile and Customs seized the vehicle pursuant to 19 U.S.C. § 1497 (1976).[1]

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[1] 19 U.S.C. § 1497 (1976) provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was be-

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred" pursuant to 19 U.S.C. § 1618 (1976),[2] in which he stated that he had intended to deliver the Canadian release papers to Canadian Customs, but had mistakenly arrived at the United States Customs instead. On February 3, von Neumann posted a cash bond of $24,500 to secure release of the vehicle. Customs acted on the petition on February 25, and informed von Neumann that the penalty for failing to declare the car was reduced to $3,600. The Regional Commissioner of Customs subsequently upheld this deter-

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gun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[2] 19 U.S.C. § 1618 (1976) provides in part:

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such a fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

mination on April 14. On remand, von Neumann argues that the delay by Customs in acting on his petition from January 20 to February 25 constituted a denial of due process.[3]

DISCUSSION

I.

Due Process Right to a Prompt Determination of the Petition

In our original decision on this appeal, we held that "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618." 660 F.2d at 1326. Subsequent to our decision, the United States Supreme Court rendered its decision in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, —— U.S. ——, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), which prompted this remand. We therefore reexamine our earlier holding in light of *$8,850*.

In *$8,850*, claimant Mary Vasquez failed to declare to Customs on September 10, 1975, that she was transporting monetary instruments exceeding $5,000 into the United States, a violation of section 231 of the Bank Secrecy Act of 1970, 31 U.S.C. § 1101 (1976). Customs subsequently discovered $8,850 in currency in Ms. Vasquez's possession, and seized it from her pursuant to 31 U.S.C. § 1102 (1976). A week later, Vasquez filed a petition for

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[3] The Supreme Court decision in *$8,850* does not disturb our earlier decision upholding the initial seizure of the vehicle under 19 U.S.C. § 1497. We therefore affirm the district court's determination that von Neumann violated section 1497 and that seizure of the vehicle was proper.

remission or mitigation. Throughout the remainder of 1975 and until May 1976, the Customs Office of Investigation conducted an investigation to determine whether the seized currency was part of a narcotics transaction. In May 1976, Customs referred the case to the United States Attorney, recommending that Vasquez be prosecuted for the reporting violation. During the ensuing criminal prosecution, Customs withheld determination of the petition for remission because the currency was needed as evidence at the criminal trial. Vasquez was convicted of the criminal violation on December 24, 1976.[4] On March 10, 1977, Customs denied the petition for remission, and referred the claim of forfeiture to the United States Attorney.

On appeal before the Supreme Court, Vasquez argued that the Government's dilatory processing of the petition and 18-month delay in filing the judicial forfeiture action violated due process. The Government countered that there was no general due process requirement of prompt post-seizure filing of a judicial forfeiture action; only a deliberate delay by the Government in order to gain an unfair tactical advantage, or a reckless disregard by the Government of the prejudicial impact of delay on the defendant, could justify dismissal of the forfeiture action. The Court found, however, that due process required a prompt filing of the forfeiture petition. —— U.S. at ——, 103 S.Ct. at 2011. The Court adopted a four-part balancing test in order to determine whether the delay between the seizure and the filing

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[4] The conviction subsequently was reversed because the court files were left in the jury room during deliberations. *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979).

of a judicial forfeiture action under 31 U.S.C. § 1102 violated the claimant's due process rights. *Id.*

$8,850 presented a somewhat different issue from that arising in the instant case.[5] A claimant may have a more compelling constitutional claim to a prompt review of the forfeiture by an independent judicial officer than he has to an administrative review of the forfeiture by Customs itself. Further, the substantive disposition of remission petitions is committed to Customs' discretion, and we will not review the merits of a claimant's petition. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d

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[5] The Bank Secrecy Act, at issue in *$8,850*, contains its own remission provision. *See* 31 U.S.C. § 1104 (1976). Von Neumann's petition, by contrast, was filed under 19 U.S.C. § 1618 (1976). Claimant Vasquez, in *$8,850*, argued that the Government's dilatory processing of her petition for remission and the dilatory commencement of a civil forfeiture action violated her right of due process. —— U.S. at ——, 103 S.Ct. at 2010. Both the Court of Appeals and the Supreme Court however, focused only on whether the delay in filing the forfeiture action violated due process. *See $8,850*, —— U.S. at ——, 103 S.Ct. at 2010-11; 645 F.2d 836, 838 (9th Cir. 1981). Neither court directly addressed the issue we reach here, the due process requirement of prompt processing of the petition for remission.

Although the Court did not directly discuss whether a delay in the processing of a petition for remission might violate due process, it does offer some guidance on the issue. The Court stated that an important justification for delay "is to see whether the Secretary's decision on the petition for remission will obviate the need for judicial proceedings." *$8,850*, —— U.S. at ——, 103 S.Ct. at 2013. It further emphasized that delay in the processing of a petition can favor both claimant and Government. *Id.* We understand the thrust of the Supreme Court's opinion to be that delay can benefit a claimant, rather than deprive him of due process, by avoiding costly and formal judicial proceedings. *Id.*

1233, 1236 (9th Cir. 1976). *$8,850*, therefore, does not necessarily impel the conclusion that due process requires a prompt determination of a petition for remission or mitigation under 19 U.S.C. § 1618.

Nevertheless, the Supreme Court's holding in *$8,850* reinforces our earlier view that due process rights attach to the processing of the petition for remission. As we observed in our earlier decision in this case:

> [f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the confiscated vehicle.

660 F.2d at 1326, *quoting United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). We find nothing in *$8,850* to disturb this conclusion. Consequently, we reaffirm our holding that due process requires Customs to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618.

II.

Application of Due Process Standards to the Processing of Von Neumann's Petition

In our earlier decision, we noted that neither judicial decisions nor administrative regulations had established standards for prompt action in the administrative consideration of a petition for remission. *See* 660 F.2d at 1326. This absence of standards prompted the court to establish guidelines to ensure the due process rights of administrative claimants. *Id.* Specifically, we held that in cases

involving vehicles of transportation, the district director should, whenever feasible, act on a petition for remission or mitigation within 24 hours of receipt. 660 F.2d at 1327.

Upon reconsideration in light of *$8,850*, however, we are persuaded that our attempt to set specific time frames for the processing of administrative petitions was ill-advised. Instead, we are guided by the Supreme Court's teaching in *$8,850*, that "due process is flexible and calls for such procedural protections as the particular situation demands." —— U.S. at ——, 103 S.Ct. at 2012, *quoting Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Due process inquiries necessarily must proceed on an ad hoc basis, and the outcome will depend on the facts of the particular case.

The analysis employed by the Supreme Court in *$8,850* provides an appropriate framework for determining whether the delay here violated von Neumann's due process rights. To determine whether government delay had abridged due process, the *$8,850* Court examined four factors: the length of the delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant occasioned by the delay.[6] —— U.S. at ——,

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[6] We find the due process analysis of *$8,850* to be compatible with the balancing approach of *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342 (9th Cir. 1977), and *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976), upon which we relied in our earlier decisions. To determine whether due process had been satisfied, *Stypmann* and *Lee* balanced the interest of the government against the interest of the individual. This analysis necessarily required some consideration of the length of the delay, the reason for the delay, the claimant's assertion of his right, and the prejudicial impact of the

103 S.Ct. at 2011-12. *See also Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). The Court noted that:

> none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

—— U.S. at ——, 103 S.Ct. at 2012.

Because the outcome depends heavily on the facts, the balancing of these four factors properly should occur first in the district court. Consequently, we remand to the district court for consideration of whether the due process requirement of fairness has been satisfied here, in light of the *$8,850* test.

Without any way attempting to foreclose the district court's decision, however, we feel it is appropriate to suggest several factors the court may wish to consider in reaching its determination. As *$8,850* noted, the overarching factor is the length of delay, which acts to some extent as a "triggering mechanism" for due process analysis:

> [W]hen a delay becomes presumptively improper . . . necessarily depends on the facts of

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delay upon the vehicle's owner. In our earlier decision, for example, we noted that Customs might take somewhat longer than 24 hours to process the petition if unusual circumstances so required. 660 F.2d at 1327 n. 16. Nevertheless, we expressly adopt here the due process analysis of *$8,850* in order to make clear the factors that have weight in the balancing process, and to avoid any suggestion that the different terminology of *Lee* and *Stypmann* results in a fundamentally different balancing test.

> the particular case. . . . Obviously short delays—of perhaps a month or so—need less justification than longer delays.

$8,850 at 4590.[7] To this we would add that the propriety of the delay may turn to a great extent upon the nature of the item that has been seized. We have previously recognized the special hardships imposed on persons deprived of the use of their automobiles:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra,* 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process required action on a petition for rescission [remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1344 (9th Cir. 1977). The potential consequences may be particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point. *See Lee v. Thornton,* 538 F.2d 27, 31 (2d Cir. 1976).

Closely allied to the length of delay is the reason the Government assigns to justify the delay. *$8,850,*

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[7] The *$8,850* Court found that the Government's 18 month delay in filing the petition for forfeiture did not violate due process because the delay was caused by an ongoing criminal investigation and prosecution. —— U.S. at ——, 103 S.Ct. at 2014-15.

—— U.S. at ——, 103 S.Ct. at 2012-13. The record here provides no obvious reason for the Government's one-month delay in processing von Neumann's petition, although we note that Customs processes a great number of petitions each year.[8] It appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition. Von Neumann had admitted both the origin of the vehicle and his failure to declare the automobile. There is no suggestion that von Neumann or the vehicle might have been involved in illegal activity other than the reporting violation and that Customs delayed processing the petition to allow an investigation as in *$8,850*.[9]

It is also undisputed that von Neumann filed his petition for remission at the time his vehicle was seized, which seems a sufficient assertion of his rights.

The final factor in the analysis is the prejudice to the individual caused by the delay. In addition to

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[8] The Customs Service processes over 50,000 noncontraband forfeitures per year. In 90% of all seizures, the claimant files an administrative petition for remission or mitigation. The Secretary grants at least partial relief for an estimated 75% of the petitions. *$8,850*, —— U.S. at ——, 103 S.Ct. at 2009.

The Supreme Court in *$8,850* recognized that delays of a month or so require less explanation than more lengthy delays. That Court, however, did not imply that no explanation at all is required. *Id.* at ——, 103 S.Ct. at 2012-13.

[9] The investigation in *$8,850* required responses from state, federal and Canadian law enforcement officials. The Supreme Court found no evidence that the Government had not pursued its investigations diligently in *$8,850*, or that delays in the criminal prosecution were caused by the Government. *$8,850* at ——, 103 S.Ct. at 2012-13.

possible loss of essential witnesses or evidence, a claimant may also be prejudiced by unanticipated, unrecoverable, expenses resulting from a seizure of his vehicle, sudden disruption of travel plans, inconvenience, or even peril, he thereby experiences. *See, e.g., Stypmann*, 557 F.2d at 1342-43; *Lee*, 538 F.2d at 33.

After weighing these and such other factors the district court considers relevant, the court should determine whether the delay violated due process and enter an appropriate judgment.

CONCLUSION

The district court's finding that von Neumann violated 19 U.S.C. § 1497 by failing to declare his car is not clearly erroneous; therefore the seizure of his car was proper. We remand, however, for determination of whether the delay in processing von Neumann's petition for remission or mitigation violated his due process right to prompt consideration of his claim, in light of the *$8,850* balancing test.

AFFIRMED in part and REMANDED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

[Filed Sept. 18, 1984]

ORDER

Before: TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Central District of California

Argued and Submitted June 3, 1981

Decided Nov. 2, 1981

Before TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

BOOCHEVER, Circuit Judge.

This appeal presents the issue of whether the procedures followed by the United States Bureau of Customs (Customs) in processing an administrative

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

petition for remission or mitigation of the forfeiture of an automobile seized at the border for failure of the owner to make the required declaration, were consistent with due process. John von Neumann's foreign-bought car was seized by Customs officials at the Canadian-United States border after he failed to declare the car upon entering the United States. On the day of the seizure, von Neumann filed an administrative claim for remission or mitigation, and later recovered the car after posting a bond as security. Over a month after the petition was filed, Customs remitted $20,900 to von Neumann, but retained $3,600 as a penalty.

Von Neumann filed a complaint in district court, challenging the penalty and the procedures used to assess it. The district court found that von Neumann violated 19 U.S.C. § 1497 by failing to declare the car and thus the seizure was proper. Additionally, the court found that the remission procedure was proper. We agree that seizure was proper under section 1497, but find fatal due process violations in the remission procedure.

FACTS

In 1974, von Neumann purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada. Prior to shipment, von Neumann registered the car in California and obtained California license plates. On January 20, 1975, von Neumann picked up the car in Vancouver and obtained a release from Canadian Customs to take possession. Canadian Customs officials gave von Neumann form A8A, which authorized transportation of the car to the border, and instructed him to deliver

the form to the Canadian Customs border station before leaving the country.

Von Neumann and a friend arrived at the United States border checkpoint at Blaine, Washington at 5:00 p.m. on January 20. The Blaine checkpoint is across the highway and slightly south of the Canadian border station. The highway approaching the Blaine Station is a multilane highway with several turnoffs for the Canadian Customs building. Von Neumann testified that he inadvertently passed the Canadian station because of poor visibility and inadequate directions. For whatever reasons, von Neumann arrived at the Blaine checkpoint without having delivered form A8A to Canadian Customs.

At the Blaine checkpoint, von Neumann and his passenger were briefly questioned by United States Immigration Officer Perkins.[1] Canadian Customs officials had earlier alerted United States Customs that von Neumann's car would be crossing the border, and Perkins matched the description to the car before questioning the occupants. Perkins asked questions relating to citizenship, and specifically asked von Neumann whether he had anything to declare. When von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the case to Customs Inspector Morrison. Upon being asked why he had not declared the car, von Neumann explained that he did not think he was

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[1] Harley Perkins was an Inspector for the Immigration and Naturalization Service, but had been serving as a designated Customs Officer since August 16, 1974. See 19 U.S.C. § 1401(i). His designation form indicates that he was to receive training necessary to serve as a Customs Inspector for arriving vehicles, aircraft, and vessels.

required to declare it. Morrison then seized the vehicle pursuant to 19 U.S.C. § 1497.[2]

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred," *see* 19 U.S.C. § 1618,[3] explaining that he had intended to deliver the Canadian Customs papers to Canadian Customs but had mistakenly arrived at United States Customs instead. After filing the petition, von Neumann arranged for other transportation into the United States, and left his car with Customs.

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[2] 19 U.S.C. § 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[3] 19 U.S.C. § 1618 provides in part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

On February 3, 1975, von Neumann posted a bond for $24,500, the value of his car, and Customs returned the vehicle.[4] On February 25, 1975, the Seattle Director of the Bureau of Customs[5] informed von Neumann that the penalty for failing to declare the car was being reduced to $3,600, and therefore $20,900 would be refunded. Von Neumann requested administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment.

Having exhausted his administrative remedies, von Neumann filed a complaint in district court on October 14, 1975, seeking: (a) return of the $3,600; (b) injunctive relief to prevent Customs from placing his name on a computer list of violators; (c) a declaration that the seizure and penalty were unlawful.[6] The district court found that von Neumann

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[4] Customs officials have the discretion to release a seized vehicle if the person claiming an interest has a "substantial interest therein." 19 U.S.C. § 1614. In this case Customs required a bond for what it considered the value of the car, as security to cover the penalty assessed. *See* 19 C.F.R. §§ 162.41(a), 162.43, 162.44(b) (1980).

[5] By statute, the Secretary of the Treasury acts on petitions for remission or mitigation. 19 U.S.C. § 1618. This authority has been delegated to district directors in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. § 171.21 (1980). The estimated value of von Neumann's car, $24,500, thus fell within the district director's regulatory authority.

[6] Customs filed a counterclaim requesting recovery of the full $24,500 in accordance with 19 U.S.C. § 1497. This claim was apparently based on the argument that since Customs has complete discretion over a petition for remission, von Neumann's challenge reopened the determination and Customs

violated 19 U.S.C. § 1497, and therefore seizure of the car was proper. The court also found that the remission and mitigation procedures were proper, and entered judgment for the government. Von Neumann appeals, challenging the imposition of the penalty as well as the procedures followed by Customs.

DISCUSSION

I. Violation of 19 U.S.C. § 1497

Von Neumann contends that the district court erred in finding that he violated section 1497, because he was never given an adequate opportunity to declare the car. The district court's determination that von Neumann was given an adequate opportunity to declare and yet failed to declare his car is a factual one, which we will not overturn unless clearly erroneous. *United States v. Wagner*, 434 F.2d 627, 628-29 (9th Cir. 1970). *See Vesey v. United States*, 626 F.2d 627, 629 (9th Cir. 1980). The record fully supports the district court's conclusion that von Neumann attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so.

Officer Perkins testified that he asked von Neumann if he had purchased or acquired anything outside of the United States that he was bringing back into the country,[7] and then asked if he had anything

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could now assess the full penalty value for the failure to declare. *See United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). The district court denied Custom's counterclaim, and Customs has not appealed that aspect of the judgment.

[7] Von Neumann claims that Perkins asked whether he had purchased anything in Canada, and he responded negatively

to declare. Von Neumann thus had two opportunities to declare the car, yet failed to do so.[8] It is irrelevant whether von Neumann was looking for the Canadian Customs building and did not intend to enter the United States without declaring the car. As the Supreme Court has held,

> "[t]o succeed in a forfeiture action under § 1497 . . . the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent."

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234, 93 S.Ct. 489, 491, 34 L.Ed.2d 438 (1972). In demonstrating that von Neumann failed to declare the car, Customs has shown that the car was subject to forfeiture and that its owner is "liable to a penalty equal to the value of such article [the undeclared car]." 19 U.S.C. § 1497.

Von Neumann argues that because Customs regulations required a written declaration for articles exceeding $25 in value, his oral statement failing to declare the car did not constitute a violation of section 1497. 19 C.F.R. § 148.-12(b)(2) (1980). This

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because the car was purchased in Switzerland. Perkins testified that his questioning was not limited to purchases in Canada, but included acquisitions anywhere outside the United States. The district court apparently credited Perkins' testimony.

[8] We note also that von Neumann was an experienced importer who had been shipping automobiles between Europe and the United States for over twenty years, and had personally crossed international borders "innumerable times." In spite of this background, von Neumann failed to mention the car after a specific Customs request.

argument is without merit. Perkins was not under any obligation to request a written declaration until von Neumann had orally declared the car, nor did von Neumann ever attempt to submit a written declaration.

Von Neumann's final argument is that he was entitled to amend his declaration up until the time his baggage was searched. Although an amendment is proper under Customs regulations, the undeclared item must be "brought to the attention of the examining officer by the passenger." 19 C.F.R. § 148.16 (a) (1980). Von Neumann failed to do this. Moreover, Customs was not required to search his baggage. The statute states that customs officers "*may* cause an examination to be made of the baggage . . . ." 19 U.S.C. § 1496 (emphasis added). Section 1496 does not provide protection from seizure up until the time a formal baggage search is conducted. The "search" took place when Officer Perkins observed the car and matched it to the description provided by Canadian Customs.

The district court's finding that von Neumann failed to declare his car, after an adequate opportunity to do so, is not clearly erroneous. We therefore affirm the district court determinations that von Neumann violated section 1497 and that seizure of the vehicle was proper.[9]

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[9] Because we affirm this portion of the district court judgment, von Neumann is not entitled to have his name removed from Customs' computer list of persons who have failed to declare merchandise, as requested in his prayer for injunctive relief.

II. Due Process Challenge to the Administrative Procedure under 19 U.S.C. § 1618

A. Petition for Remission or Mitigation

Under 19 U.S.C. § 1618, a person whose property is seized and subject to forfeiture may file an administrative petition for remission or mitigation of the penalty. *See* note 3, *supra*. In cases where the forfeiture value does not exceed $25,000, the district director may remit or mitigate the penalty "under the law and in view of the circumstances, [as] he shall deem appropriate . . . ." 19 C.F.R. § 171.21 (1980). The administrative remission process is independent of a judicial action for forfeiture, which must be initiated promptly. 19 U.S.C. §§ 1602-04; *Seguin v. Eide*, 645 F.2d 804, 808 (9th Cir. 1981); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). In this case, judicial forfeiture proceedings were never initiated; we are only concerned with the propriety of the administrative procedures followed by Customs.

The substantive disposition of remission petitions is committed to the Customs Bureau's discretion, and we will not review its decision on the merits of a claimant's petition. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). In this case, however, von Neumann is challenging the procedures utilized to reach the substantive decision. Specifically, he claims that the delay of over a month in acting on his petition was a denial of his fifth amendment right to due process.[10]

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[10] Because border seizure is an "extraordinary situation" requiring immediate action, the ordinary due process requirements of notice and hearing prior to deprivation of property

B. Due Process Right to a Prompt Determination

The cases interpreting 19 U.S.C. §§ 1602-04, requiring prompt initiation of judicial forfeiture proceedings, make it clear that due process depends on the circumstances of each individual case. *See e.g. Seguin v. Eide*, 645 F.2d 804, 808-09 (9th Cir. 1981) (delay of almost 5 months excessive); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977) (delay of 11 months excessive); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897, 901 (8th Cir. 1977) (delay of 5 months justified). The rule in this circuit is that filing of a petition for remission under section 1618 does not excuse Customs from its burden of prompt referral for judicial forfeiture. *Ivers v. United States*, 581 F.2d 1362, 1372 (9th Cir. 1978).

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are not required. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80, 94 S.Ct. 2080, 2090, 40 L.Ed.2d 452 (1974); *Ivers v. United States*, 581 F.2d 1362, 1367-68 (9th Cir. 1978). Customs argues that this was the only issue before the district court, and therefore von Neumann is precluded from arguing that a prompt post-seizure hearing is required.

The pre-trial conference order indicates that one of the issues of law to be considered was:

> "Is the procedure which was instituted against Plaintiff and the Automobile, whereby the Automobile may be forfeited and seized, and then remission and mitigation proceedings begun, an unconstitutional violation of the due process clause of the Fifth Amendment to the United States Constitution." The issue is framed in sufficiently general terms to include both pre- and post-seizure due process requirements. Moreover, the case of *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976), which found post-seizure administrative delay to be a due process violation, was cited and discussed below. We therefore conclude that the propriety of the post-seizure administrative delay is properly before this court.

By contrast, there has been little interpretation of the due process requirements for the remission procedure itself, when judicial proceedings have not been initiated.[11] This is perhaps in part because the statutory language authorizing remission does not place any time restrictions on Customs, while the judicial referral statutes use the terms "immediately," "promptly," and "forthwith". *Compare* 19 U.S.C. § 1618 *and* 19 C.F.R. §§ 171.11-171.33 (1980) *with* 19 U.S.C. §§ 1602-04. The absence of statutory language does not eliminate the constitutional requirement of due process, however. The informal, remedial nature of the administrative petition makes rapid processing essential.

The purposes of the section 1618 remission process have been described as follows:

> [F]irst, to permit an administrative review of the propriety of the seizure and the equities involved before any formal court action begins, and second, to give a claimant to seized property a quick, expeditious method of getting his property back without the necessity of hiring a lawyer to defend a court proceeding.

United States v. Eight (8) Rhodesian Stone Statutes, 449 F. Supp. 193, 202 (C.D. Cal. 1978). The need for

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[11] A panel of this court recently held that the owner of a vehicle seized for a drug violation under 21 U.S.C. § 881(a) did not have a due process right to a probable cause hearing within 72 hours of seizure. *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, at 819-820 (9th Cir. 1981). The panel found that the strong government interest in enforcing narcotics laws outweighed the individual interest at stake. The *One 1971 BMW* panel was not faced with a challenge to the promptness of remission procedures, since a petition for remission was never filed. *See* at 821-822.

prompt action is particularly acute where the seized property is an automobile, because "both the necessities and amenities of life may depend upon the availabilities of an automobile when needed." *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). *See United States v. One 1971 Opel G.T.*, 360 F. Supp. 638, 641 (C.D.Cal. 1973) (automobile is a rapidly depreciating asset). In this case von Neumann was not only deprived of an asset, he was left without transportation at the border, a potentially serious consequence for many travelers. *See Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).

Lee is the only case directly addressing the due process argument advanced by von Neumann. Lee was accused of using his van to bring undeclared persons, merchandise, and marijuana into the country. The van and merchandise were seized, and Lee was assessed a penalty equal to the value of the van. He was informed that the van and merchandise were subject to forfeiture and that he could file a petition for remission or mitigation under section 1618. Lee filed a petition within a few days of seizure and recovered the van after paying $100, the amount of the reduced penalty.[12]

The *Lee* court reversed the penalty assessment because Customs failed to provide Lee with a prompt hearing on his remission petition. The court first balanced the serious nature of the individual property deprivation against the inconvenience to government

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[12] *Lee* was a consolidated appeal, and the factual circumstances of appellant Rich's cases were similar to Lee's. Although seizure in *Lee* was pursuant to 19 U.S.C. §§ 1460, 1594, and 1595a, and in the instant case was pursuant to 19 U.S.C. § 1497, *Lee* was an interpretation of the remission statute at issue here: 19 U.S.C. § 1618. 538 F.2d at 31.

in providing a prompt determination of the legality of the detention. 538 F.2d at 33. An important factor in the individual's interest is the hardship that even a temporary deprivation of an automobile might cause. *See Stypmann*, 577 F.2d at 1343; *One 1971 Opel G.T.*, 360 F. Supp. at 641. On the other hand, once a seizure is accomplished, the government's justifications for delaying a hearing are not compelling. *Wiren v. Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976). After balancing the competing interests, the *Lee* court held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33.

Although not bound by the Second Circuit's holding in *Lee*, we find its reasoning persuasive. This court expressly relied on the *Lee* rationale to invalidate a California towing and possessory lien statute[13] in *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977). The statute in *Stypmann* granted towing companies, who had possession of a car because of a traffic violation, a possessory lien on the vehicle to insure recovery of towing and storage fees. The court held that this statute could not with-

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[13] Cal. Veh. Code § 22851.

stand a due process attack because it did not provide for a prompt post-seizure hearing to determine probable cause for the seizure. The *Stypmann* court stated:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra,* 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process required action on a petition for recission [remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Id. at 1344 (footnote omitted).[14] *Lee* was also cited for the propositions that a car is an important individual asset, *id.* at 1342 n.8 & 1344 n.22, and that a court must balance governmental and individual interests to determine due process, *id.* at 1342.

The government contends that *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978), stands for the proposition that the due process requirements of prompt notice and hearing only apply to judicial forfeiture proceedings, not administrative proceedings under 19 U.S.C. § 1618. The issue in *Ivers*, however, was whether the filing of an administrative petition operated as a waiver of a claimant's right to a prompt forfeiture action. The court held that it did not. *Id.* at 1370. In dicta, the *Ivers* court stated:

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[14] *Stypmann* held that five days was too long of a delay, but did not establish what time period would be proper 557 F.2d at 1344-45.

> Administrative consideration of a claimant's petition for remission is not governed by any statutory or regulatory requirement of promptitude. Nor does it not afford a claimant the full panoply of due process rights inherent in a judicial proceeding. Remission being a matter of legislative grace, the exercise of the Secretary's discretion is not reviewable by the courts.

Id. at 1371. The tone of this statement indicates that the word "not" in the second sentence may be a misprint. It seems that the court was merely emphasizing the informal nature of the administrative process. We agree that an administrative hearing does not require all the protections of a judicial hearing, but we believe a claimant is entitled to prompt disposition of an administrative claim.

The balance of the *Ivers* opinion suggests that due process does require a prompt resolution of administrative claims. The court noted that administrative proceedings are informal and inexpensive, and will often obviate the need for judicial action since remission petitions are frequently granted. *Id.* at 1370. If time limits are not imposed on the administrative process, the government might be forced to bring a judicial action prior to the completion of the administrative claim. Once a case is referred for judicial action, the administrative proceedings on a petition for a remission must cease. 19 C.F.R. § 171.2(a) (1980). Therefore delay in ruling on a claimant's petition could force a more cumbersome and time-consuming judicial forfeiture action. *See Ivers*, 581 F.2d at 1370, *United States v. Eight (8) Rhodesian Stone Statutes*, 449 F. Supp. 193, 202 (C.D.Cal. 1978). The rationale of the *Lee* case is further supported by cases from this circuit. In *United States v.*

One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977), we stated: "[f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the conficated vehicle." *Id.* at 866 (referring to various stages of the judicial forfeiture procedure). The United States District Court for the Central District of California, citing *Lee*, noted that "[a] growing number of decisions enunciate the proposition that *both* the adjudication of the administrative claim and the filing of a court action when required, must be speedily done." *Eight (8) Rhodesian Stone Statutes*, 449 F. Supp. at 200 (emphasis added). *See also Pollgreen v. Morris*, 496 F. Supp. 1042, 1051-53 (S.D.Fla. 1980) (invalidating seizure of vessels used in Cuban "Freedom Flotilla" for failure to provide prompt post-seizure hearings; relying on *Lee* and *Stypmann*); *F/V American Eagle v. State*, 620 P.8d 657, 666-67 (Alaska 1980) (citing *Lee* and *Stypmann* for the proposition that a post-seizure hearing must be prompt even when the government interest is "urgent"). We therefore adopt the *Lee* rationale and hold that due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618. The one month delay in processing von Neumann's petition does not conform to this standard.

C. What constitutes a Prompt Determination

We have concluded that Customs must act on a remission petition promptly and that the one month delay in processing von Neumann's petition was unreasonable. This court has not yet formulated specific

standards, but we are guided by the *Stypmann* court, which held that a five-day delay in providing a hearing violated due process. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977). Although Customs regulations provide specific requirements for remission petitions, including a 60 day limitation on filing a petition, the regulations do not place any time constraints on administrative consideration of a petition. 10 C.F.R. § 171.12(b) (1980); *See generally* 19 C.F.R. §§ 171.11-171.33 (1980).

In the absence of any appropriate regulatory provisions, we find that the imposition of guidelines is necessary to ensure the due process rights of administrative claimants. No showing has been made that the time limits set by the Second Circuit in *Lee* have proved unreasonably burdensome. We hold that in cases involving vehicles of transportation within a district director's authority under 19 C.F.R. § 171.21 (1980),[15] the director must ordinarily, depending upon the nature of the article seized,[16] act on a peti-

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[15] The district director has authority to act in cases involving a total value of merchandise not exceeding $25,000. *See* note 5 *supra*. The due process requirements for cases involving greater value than $25,000, which are decided by the Commissioner of Customs, are not before us. *See* 19 C.F.R. § 171.11(a) (1980). We note that the greater the value of the merchandise, the greater the potential for a burden on individual rights. On the other hand, the administrative machinery may need more time to operate when the district director is not authorized to act.

[16] Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process.

tion for remission or mitigation within 24 hours of receipt. The claimant must be allowed the opportunity to make an oral appearance to argue his or her claim. Because the administrative delay in processing von Neumann's petition violated his due process rights, we reverse and remand with instructions to enter judgment for von Neumann in the amount of $3,600 plus costs. *See Lee*, 538 F.2d at 33.

CONCLUSION

The district court finding that von Neumann violated 19 U.S.C. § 1497 by failing to declare his car is not clearly erroneous, therefore the seizure of his car was proper. The delay in processing von Neumann's petition for remission or mitigation, however, violated his due process right to prompt consideration of his claim. Because we hold that Customs must ordinarily act on a petition for remission within 24 hours of receipt, we reverse and remand with instructions to enter judgment for the plaintiff.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3761

DC No. 75-3453-RF

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

[Filed May 1, 1982]

ORDER

Before: TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge

The Opinion in the above-entitled case is modified as follows:

(1) At page 5512 of the slip opinion, second paragraph, left column, the third sentence is amended to read:

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

We hold that in cases involving vehicles of transportation within the district director's authority under 19 C.F.R. § 171.21 (1980),[15] the director should whenever feasible [16] act on a petition for remission or mitigation within 24 hours of receipt.

(2) Footnote 16 is amended to read as follows:

[16] Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of essential information or of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process. We further do not foreclose the promulgation of a regulation setting forth any appropriate standard in accordance with the principles set forth in this opinion.

The panel as contituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-3453-RF

JOHN VON NEUMANN, PLAINTIFF

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS

[Sept. 20, 1979]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for court trial before the Honorable Robert Firth, United States District

Judge, and after a thorough consideration of the evidence presented therein, the Court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

I

In or about June, 1974 plaintiff purchased a 1974 Panther automobile (hereinafter "automobile") in Switzerland shipped it to Vancouver, Canada with the intention of bringing it into the United States.

II

Prior to importation into the United States, plaintiff had the automobile registered in the state of California and obtained California license plates for the automobile.

III

On January 20, 1975, plaintiff and Paul R. Ginther went to the warehouse at the docks in Vancouver, British Columbia where the automobile was being kept, and obtained a release from Canadian Customs to take possession of the automobile. Plaintiff was given Canadian Customs form A8A which authorized him to transport the car from Vancouver to the location of Canadian Customs near the Canadian-United States border in British Columbia. Plaintiff was instructed to deliver form A8A to Canadian Customs upon leaving Canada.

IV

The Canadian Customs office at which plaintiff was to deliver form A8A is known as the Pacific Highway station, and is located across the highway and a little north of the Blaine, Washington, United States border

checkpoint. The highway approaching the Blaine, Washington, checkpoint is a multi-lane highway. There were several turn-offs from the highway to the Canadian Customs building prior to reaching the United States border checkpoint. Nevertheless, plaintiff failed to stop and deliver form A8A to Canadian Customs officials.

V

United States Customs Officials at the Blaine, Washington, checkpoint station had been informed by Canadian Customs officials that an automobile had arrived from a foreign country and had been consigned to plaintiff. Such information included the description and license plate number of the automobile.

VI

Plaintiff and Mr. Ginther arrived in the automobile at the United States border checkpoint at Blaine, Washington, at approximately 5:00 p.m., and they were confronted by United States Immigration Officer Harley Perkins.

VII

Officer Perkins asked several questions of plaintiff and Mr. Ginther relating to the citizenship and birthplace of plaintiff and Mr. Ginther, whether Plaintiff and Mr. Ginther had any firearms or alcohol in the automobile, and whether they had anything to declare to Customs.

VIII

Plaintiff failed to declare the automobile to the United States Customs official. By doing so, plaintiff attempted to introduce the automobile into the commerce of the United States contrary to the Customs laws of the United States.

IX

The automobile was retained by the customs officials, and Plaintiff and Mr. Ginther took a taxi into the United States, where they arranged for other transportation.

X

Within a couple of weeks of January 20, 1975, plaintiff offered to pay the amount of $24,500.00, in accordance with 19 U.S.C. § 1614 and 19 C.F.R. § 162.44, to secure the release of the automobile without prejudice to any of his rights, and this offer was accepted by Customs.

XI

Plaintiff, prior to leaving the Blaine, Washington border checkpoint prepared, at the request of customs officials, a Petition for Remission or Mitigation of Forfeiture and Penalties incurred. Thereafter, Plaintiff through his attorneys, proceeded with the remission and mitigation procedures.

XII

In or about March, 1975, a decision was made for remission of penalty of all except $3,600.00 which decision was affirmed upon appeal by the Regional Director in San Francisco, California. The remaining $20,900.00 was returned to plaintiff.

XIII

On October 14, 1975, Plaintiff filed a complaint of return of penalty and declaratory and injunctive relief, seeking to have declared improper the penalty in the amount of $3,600.00 assessed against him pursuant to the customs laws of the United States.

XIV

On February 2, 1976, defendants answered and filed a counter-claim for the forfeiture value ($24,500.00) of the goods which plaintiff attempted to introduce into the commerce of the United States contrary to the applicable statutes and regulations.

XV

To the extent that these findings of fact contain conclusions of law, they shall be deemed incorporated within Conclusions of Law.

CONCLUSIONS OF LAW

I

This court has jurisdiction of this action.

II

Plaintiff violated 19 U.S.C. § 1497 and was subject to penalty or forfeiture thereunder.

III

The seizure of plaintiffs' automobile by the United States Customs officials was proper.

IV

The remission and mitigation procedures were proper.

V

Judgment should be entered for the Defendant on the Complaint and for the Plaintiff and Counter-defendant of the Counterclaim.

VI

To the extent that these Conclusions of Law contain findings of fact, they shall be deemed incorporated within the findings of fact.

DATED: This 20 day of Sept. 1979.

/s/ R. Firth
United States District Judge

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
HOWARD GEST
Assistant United States Attorney
Attorneys for Defendant.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Civil Action No. 79-3761

D.C. No. 75-3453-RF

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

[Filed May 21, 1984]

DECLARATION OF DONALD W. LEWIS
DIRECTOR, ENTRY PROCEDURES AND PENALTIES DIVISION
OFFICE OF REGULATIONS AND RULINGS
OFFICE OF COMMERCIAL OPERATIONS
UNITED STATES CUSTOMS SERVICE

Donald W. Lewis, being duly sworn, deposes and says:

1. That I am now and since January 1982 (and from 1974 through 1976), have been Director of the Entry Procedures and Penalties Division, Office of Regulations and Rulings, Office of Commercial Opera-

tions, United States Customs Service, with offices located at 1301 Constitution Avenue, N.W., Washington, D.C. 20229. As the Director of the Entry Procedures and Penalties Division, I have direct supervision of two penalty branches, and the Entry, Licensing and Restricted Merchandise Branch. My duties as a supervisor of the two penalty branches includes responsibility for the implementation, review, and evaluation of Customs Fines, Penalties and Forfeitures (FP&F) Program as well as providing leadership, advice and guidance to Customs District Directors and FP&F officers throughout the country concerning the administrative processing of petitions for mitigation or remission and related matters pertaining to the seizure of automobiles and other merchandise for violation of the Customs laws.

2. I have from August 12, 1979 to January 1982 served as Director of the Office of Regulations and Rulings. I was responsible for the development, implementation, and evaluation of Customs servicewide programs, policies and procedures pertaining to regulations and rulings issued by and affecting the Customs Service. In discharging this responsibility, *inter alia*, I exercised supervision over the Entry Procedures and Penalties Division of the Office of Regulations and Rulings. Consequently, I was very involved in and knowledgeable about the Customs Fines, Penalties and Forfeiture Program which among other items included instructions and procedures to be followed in the administrative processing of petitions for mitigation or remission that are filed when automobiles and/or the other merchandise have been seized for forfeiture for violation of the Customs laws. As director, I provided functional supervision and guidance to regional and other field personnel in the area

of the administrative processing of petitions for mitigation or remission as well as in all regulations and rulings matters.

3. That from February 1976 to August 12, 1979, I served as Deputy Assistant Commissioner, Office of Regulations and Rulings, U.S. Customs Service with offices located at 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Among my important duties and responsibilities as Deputy Assistant Commissioner were to review and evaluate Customs regulations and procedures relating to its Fines, Penalties and Forfeitures Program. As a result of court decisions in the 1970's Customs issued on FP&F Handbook in January 1978, which included detailed instructions and procedures to be followed by Customs personnel in the performance of their respective duties in a number of different areas, including the issuance of civil penalties, and the expeditious administrative processing of petitions for mitigation and remission. Subsequently, this Handbook was updated, revised and issued in 1979, as the "March 1979 Revision of the Fines, Penalties and Forfeitures Handbook." I was an active participant in the development and implementation of these FP&F Programs and served as a principal author of the March 1979 revision. I have attached a copy of Chapter IX of the Customs Fines, Penalties, and Forfeitures Handbook, March 1979 revision, which is the version currently in effect and which governs procedures for handling of the administrative petitions. (See Attachment.)

4. That from 1971 to 1975, I was Chief of the Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. As Chief of the Penalties Branch, I participated in the

formulation of policy and in the development and implementation of regulations and procedures concerning *inter alia* the administrative processing of petitions for mitigation or remission of fines, penalties and forfeitures. Further, as Chief of the Branch I maintained frequent contact with District Directors, FP&F officers and other Customs personnel servicewide involved in the day to day operation of the Customs Fines, Penalties and Forfeitures Program. In this way I was able to keep informed of the successes and with the difficulties and problem areas associated with the practical operation of the FP&F Program.

5. That as a result of my experience and background having served as Deputy Assistant Commissioner, Office of Regulations and Rulings, Director, Office of Regulations and Rulings, Chief of the Penalties Branch, and currently as Director, Entry Procedures and Penalties Division, I have a thorough knowledge and understanding of Customs Fines, Penalties and Forfeitures Program and as such I am familiar with the laws, regulations and procedures pertaining to seizures of merchandise, penalty assessment, the mitigation and remission process and the administrative and judicial forfeiture of seized merchandise.

6. That the Office of the Chief Counsel for the U.S. Customs Service provided me with a copy of the Ninth Circuit's second decision in the above-captioned case. I have read and examined the Court's decision several times to determine its impact on Customs Fines, Penalties and Forfeiture Program. Based on my knowledge and experience with Customs FP&F Program, particularly as it relates to the administrative processing of petitions for mitigation or remission I declare the following:

7. That despite expeditious actions by Customs upon receipt of petitions for mitigation or remission, in a large number of seizure cases, less than three to six months is simply not enough time for Customs to obtain the information which is necessary to make an informed decision on petitions. Under our present procedures (FP&F Handbook Chap. 2 Section 2.3 (d)), when an item is seized, a notice of seizure is sent to the interested parties within 3 days of the seizure, advising them of their right to have the case promptly referred to the United States Attorney for institution of judicial forfeiture proceedings and of the right they have to submit a petition for remission to Customs within 30 days (in some vehicle cases) or 60 days (in all other case) outlining their claim for mitigation. In the majority of cases, interested parties agree to defer initiation of judicial or administrative forfeiture proceedings in favor of the administrative process.

8. Upon receipt of petitions for remission, many are referred to the Office of Investigations ("OI"), U.S. Customs Service for investigation and consideration of allegations raised in the petition in accordance with page 119 of the 1979 FP&F Handbook. Upon completion of the investigation by OI, a report of Investigation is prepared setting forth all available evidence with respect to the information requested on the statements and claims made by petitioners, for transmittal to and use by the District Director or his designee in making his decision on the petition.

9. That Customs considers a wide variety of factors in making a decision on whether to mitigate forfeiture. Whether there was sufficient evidence (probable cause) to support the seizure is just the first

step in analyzing a petition. Evidence to support a seizure and hence a forfeiture is present at the time the vehicle or other item is seized, otherwise the seizure would not have been made in the first instance or it would be cancelled. Once it is determined that there is probable cause for the seizure, other factors which would not be relevant in a judicial forfeiture action must be considered under our mitigation guidelines in reaching a decision on whether any relief should be granted, and if so how much. Some of the factors considered are:

a. Whether the violation occurred in connection with a commercial shipment rather than an importation for personal use. If it is found to be a commercial shipment, mitigation generally would be less.

b. Whether the petitioner has a previous record with Customs as a violator, and if so the nature of the previous violations are.

c. Whether the violation occurred as a result of negligence in failing to declare merchandise or whether the violation was willful.

d. If there are competing claims to the property, which claim has priority or what is an appropriate division of the claims.

e. Whether the owner of the property e.g. bank or lien-holder was innocent of any wrongdoing in connection with the violation which gave rise to the seizure.

f. In the case of currency seizure, the source and intended use of the currency brought into the country illegally is critical to a decision on whether to grant relief from forfeiture.

g. The criminal history of the petitioner as it might relate to any of these considerations.

h. The validity of a claim by an individual that forfeiture would work an extraordinary financial hardship upon him or innocent family members.

10. That evaluating these factors usually takes well over a month. For example, in a currency petition, verification of claims of legitimate source and intended use of the money often requires verification of information outside the United States; a check of petitioner's previous record of violations with Customs could require a search and retrieval of case files which have been placed in storage at a federal records center or in Customs offices across the United States since it is often necessary to obtain copies and read the case file to decide the nature and severity of a previous violation; verifying a claim of a lienholder or owner's claim of innocence or lack of knowledge of the intended illegal use of the seized item can require extensive investigation as can a claim that a shipment is personal when it appears to be commercial in nature. The investigations necessary to verify the various claims by petitioners can require the compilation of witnesses interviews sometimes of persons in other countries, as well as a compilation of a wide range of evidence which may include documents obtained from foreign governments. Such documents often require translation and clarification as to there significance.

11. That the record in *Von Neumann* raises several of the factors previously listed. For example, Von Neumann claimed that his failure to declare the vehicle was inadvertent. While intent to violate the law is not relevant to a forfeiture action (see *Von Neumann* I, 660 F.2d 1319 p. 1323), intentional rather than negligent failure to declare would mean less mitigation. To determine if the violation was

willful, Customs would check its records to determine if Von Neumann had entered the United States at Blaine or other places before thus raising an inference that he is familiar with the port and Customs requirements. In addition, further investigation would be appropriate to determine if Von Neumann imported the vehicle for his personal use or if he intended to sell it. If it were determined that he had intended to sell the vehicle, the amount of mitigation would be about one-half of the amount of personal use importation. I understand that the record in the *Von Neumann* case indicates that the vehicle was not registered in Von Neumann's name. This fact would require investigation to verify his claim that he was the owner of the vehicle. It also raises the possibility that Von Neumann was importing the vehicle for someone else and that there might be other persons subject to Customs penalties or that the importation was commercial.

12. That another factor contributing to delay in the petitioning process is the availability of supplemental petitioning rights (19 C.F.R. 711.33) which allows a violator to file a second petition if he is dissatisfied with the decision reached in the first. Under the regulations, the violator has 60 days from the date of the decision in the first petition to file a second supplemental petition, and he may raise new mitigating factors such as financial hardship which may require further investigation.

13. That finally, in seizures valued at more the $25,000 the decision on the petition must be made by our Headquarters Office of Regulations and Rulings in Washington, D.C. and in seizures valued at $100,000 the final decision must be by the Department of Treasury with recommendation from the

Customs District Director and Headquarters. These levels of review and supplemental petition rights are desgined to insure that petitioner receives a fair and relatively independent review of his petition.

14. That I understand the Court's recent decision in *Von Neumann* to hold *inter alia* that the passage of either 11 days (January 20, 1974 to February 3, 1974—date of seizure of vehicle to the date it was returned to Von Neumann) or 33 days (January 20, 1974 to February 25, 1974—date of decision on the first petition) constitutes a delay by Customs long enough to raise a trialable issue of a due process violation founded in the Fifth Amendment.

15. That because most decisions on petitions (approximately 70 percent) normally take more than 30 days for the reasons discussed above, this holding means that Customs could be faced with litigating the due process issue in Federal Court in many cases which heretofore have been settled through the petitioning process.

16. That at the present time approximately 95 percent of petitions for mitigation or remission in car seizure cases are settled administratively i.e. the forfeiture is remitted upon payment of a mitigated penalty, and the vehicle is returned to the petitioner upon payment of the mitigated amount, without the necessity of instituting either administrative or judicial forfeiture proceedings (depending upon the value of the vehicle seized).

17. That although the parameters of the *Von Neumann* decision are not clearly defined, a broad reading of the decision, if implemented, could mean that Customs will be compelled to deny petitions within 30 days due to inadequate knowledge of the pertinent facts and circumstances rather than run the

risk of losing the case on due process grounds or having to litigate this issue in every case. As a result, perhaps as high as 70 percent of all seizures made by Customs would require referral for either judicial or administrative forfeiture proceedings. Nearly all of these referrals would be cases that under our present system would have been settled by the granting of administrative relief.

18. That briefly stated and in summary, the *Von Neumann* decision if it stands would, in my opinion, have a disruptive effect on the implementation of the Customs FP&F Program described in detail in Attachment I. Many petitioners whose petitions would have been resolved administratively will find themselves tied up in the Federal courts in a more formal and costly proceeding having to retain an attorney and in some cases pay attorney fees and winding up in a much worse position than if Customs could have acted expeditiously on their petition administratively.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Donald W. Lewis
DONALD W. LEWIS
Director, Entry Procedures
and Penalties Division
Office of Regulations and
Rulings U.S. Customs Service

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No. 84 1144

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals correctly rule that the balancing factors set forth in United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983), should be applied in petitions for remission or mitigation arising from seizure of an automobile?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision and Statutes Involved	2
Statement of the Case	3
Reason to Deny the Writ	6
Conclusion	10

INDEX TO APPENDICES

Appendix A	1(a)
Appendix B	13(a)
Appendix C	31(a)

TABLE OF AUTHORITIES CITED

Cases

Barker v. Wingo, 407 U.S. 514, 530 .... 7, 10
Connecticut Board of Pardons v. Dumshat, 452 U.S. 458 (1981) 7, 8
Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) 7, 8
Lee v. Thornton, 538 F.2d 27 (Second Circuit 1976) 7, 10
Stypman v. City and County of San Francisco 557 F.2d 1338 (Ninth Circuit 1977) 7, 10
The One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234 (1972) 8
United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850) in United States Currency, 461 U.S. 55 (1983) 2, 6, 7, 10

Constitution

Fifth Amendment to the Constitution 2

Statutes

19 U.S.C. §1497 ..... 2, 5
19 U.S.C. §1618 ..... 2, 6, 7
28 U.S.C. §1254(1) 2

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Respondent, John Von Neumann, prays that this court deny the petition for writ of certiorari filed by petitioner to seek review of the judgment of the United States Court of Appeals, Ninth Circuit, dated March 30, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 729 F.2d 657, and is set forth in Appendix "A" hereto, infra, p. A-1. The previous opinion of the Court of Appeals is reported at 660 F.2d 1319 (except for certain modifications). The opinion is printed in Ap-

pendix "B" hereto, infra, p. A-13; the modifications are printed in Appendix "C" hereto, infra, p. A-31.

JURISDICTION

The jurisdiction of the Supreme Court is based upon 28 USC §1254(1).

QUESTION PRESENTED

Did the Court of Appeals correctly rule that the balancing factors set forth in United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983), should be applied in petitions for remission or mitigation arising from seizure of an automobile?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

19 U.S.C. 1497 provides:

> "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not metioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article."

19 U.S.C. 1618 provides in pertinent part:

> "Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have

incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, . . . a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just . . . ."

STATEMENT OF THE CASE

In 1974, Respondent purchased a 1974 Jaguar Panther automobile in Switzerland (C.A. App. 33).[1]

In the fall of 1974, Respondent decided to import the automobile into the United States and had the automobile shipped to Canada through a customs broker in Switzerland and a customs broker in Canada. Respondent intended to take a Canadian vacation with a friend and to use the automobile for the vacation, but at the time the automobile arrived, the Respondent's friend was ill and the vacation plans had to be cancelled (C.A. App. 36).

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[1] "C.A. App." refers to the excerpt of record filed with the Court of Appeals. "Tr." refers to the transcript of the trial proceedings. For ease of reference, many references with respect to the facts of this case are to the uncontested and/or admitted facts set forth in the Pretrial Conference Order, pages 31-42 of the excerpt of record filed with the Court of Appeals.

On January 20, 1975 Respondent and a Mr. Paul R. Ginther went to Vancouver, B.C. to take delivery of the automobile. They were given a customs form A8A, Customs Cargo Control by Canadian Customs and instructed to deliver the documents to the Canadian Customs Station upon leaving Canada. Respondent and Mr. Ginther proceeded towards the Canadian/ United States border and arrived at the check point at Blaine, Washington at approximately 5:00 p.m. on January 20, 1975 (C.A. App. 33).

Respondent and Mr. Ginther were confronted by a United States Immigration official, who in a span of approximately thirty seconds asked both passengers of the automobile several questions relating to citizenship, birthplace, purchase of firearms and alcohol, purchases in Canada, and one question with respect to declaration of articles for customs (C.A. App. 33, 57; Tr. 113-114).

Canadian Customs officials had alerted the United States Customs officials in Blaine that the automobile in question had been off loaded in Vancouver and may be traveling across the border into the United States (Tr. 110-111). The immigration official who had questioned the Respondent and Mr. Ginther had noted that the license plates on the automobile had matched the license plates described in the notice from Canadian Customs (Tr. 111-113).

The immigration official instructed Respondent to park the automobile and enter the building at the border. Respondent did as requested and upon entering the building was confronted by a United States customs officer who seized the automobile without giving Respondent any further opportunity to declare the automobile for customs purposes (C.A. App. 34; Tr. 42, 87, 162 and 169).

A criminal investigator interviewed Respondent that night and determined that there were no grounds for any criminal action (C.A. App.

34). At the request of the customs official, Respondent prepared a Petition for Remission or Mitigation of Forfeitures and Penalties Incurred. Respondent, through his attorneys, proceeded with the remission and mitigation, contending throughout that he was not seeking only remission or mitigation but a full refund of any and all penalties since there were no grounds for forfeiture or seizure in the first place. Within a couple of weeks, Respondent obtained release of the automobile by posting $24,500 without prejudice to any rights (C.A. App. 34, 57). In the Petition, Respondent contended that he intended to deliver the Canadian Customs form to Canadian Customs prior to entering the United States and declaring the automobile, and was in fact looking for Canadian Customs when he arrived at the United States Custom Station. Though it was found by the trial court that Respondent failed to deliver the Canadian Customs form A8A to Canadian Customs himself, the form eventually was delivered by someone to Canadian Customs on January 20, 1975 (Tr. 32-33; C.A. App. 35, 57).

The initial decision on the Petition for Remission and Mitigation was made on February 25, 1975 and was that all penalties except $3,600 be returned to Respondent. This decision was appealed and upheld by the Regional Commission of Customs in San Francisco on April 14, 1975 (C.A. App. 17). Respondent proceeded to file a complaint against Petitioner in October of 1975 (C.A. App. 2). Trial took place on October 25 and 26, 1977. The court issued its Minute Order on June 30, 1978. Final judgment was entered on September 20, 1979. Respondent filed his notice of appeal on November 16, 1979 (C.A. App. 64). The Court of Appeals affirmed the District Court's decision only with respect to the finding that Respondent violated 19 U.S.C. Section 1497 by failing to declare the automobile. The Court of Appeals reversed the

District Court's decision by holding that the Respondent's due process right to prompt consideration of his post-seizure claim of an improper seizure of his automobile, was violated.

Petitioner sought certiorari, and this Court granted the petition and vacated and remanded for reconsideration in light of United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983). 462 U.S. 1101 (1983).

On remand, the court of appeals 769 F. 2d 657, reaffirmed "that due process requires Customs to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. §1618." (App. p. A-7) The court of appeals remanded the trial court to determine whether petitioner had met due process allegations under the four factors noted in $8850 in light of the unique hardships involved in seizure of an automobile.

REASONS TO DENY THE WRIT

The court of appeals decision correctly complied with the directive of the Supreme Court to give "further consideration in light of United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency."

The court of appeals faithfully followed the direction upon remand from the Supreme Court. It changed its original decision that the hearing was required in twenty-four hours, and stated that the question of due process violation was to be determined on the basis of the four factors stated in $8850. Petitioner, having sought a review to bring the court of appeals into line with $8850, now seeks to reverse the court of appeals decision which expressly applies $8850 to the case at bar.

The main basis of the petition is that the due

process clause has no applicability to petitions for remission because they are matters for executive grace. Petitioner acknowledges that the Supreme Court in $8850 expressly held that due process does apply to such matters. In fact, the entire thrust of $8850 was to develop the factors for adjudication of the due process question in each case. Nevertheless, petitioner now revert to the contention that due process should not apply. The decision of the court of appeals is based upon Lee v. Thorton, 538 F.2d 27 (Second Circuit 1976) and Stypman v. City and County of San Francisco, 557 F.2d 1338 (Ninth Circuit 1977). The Supreme Court in $8850 did not overrule or question the ruling of Lee v. Thorton, which expressly held that due process applies to petitions for remission under 19 U.S.C. Section 1618.

The fact that this case involves a discretionary administrative procedure is not relevant to the question of whether or not prompt post-seizure hearing is required. The hearing is for the purpose of deciding both the propriety of the seizure in the first place, and whether or not there are circumstances justifying a return of property and some mitigation of the penalty.

The fact that the remission and mitigation proceeding is the process most suited for such a hearing in this case, does not affect the fact that the due process clause requires there to be a hearing. If the statute did not provide for a remission and mitigation proceeding, there would have to be a hearing through another means.

Petitioner tries to analogize this case to numerous cases involving prisoners' rights. Petitioner makes reference to Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), Connecticut Board of Pardons v. Dumshat, 452 U.S. 458 (1981) and several other cases involving prison inmates. In Greenholtz prisoners' claimed they

had been unconstitutionally denied parole by the Nebraska Parole Board. This Court held that a due process protection is not created whenever a state provides the possibility of parole since this is no more than a mere hope that a benefit will be obtained. If there is an expectancy, there is some entitlement to some process under the due process clause. In Dumshat this Court held that a state felon's expectancy that a lawfully imposed sentence will be commuted was no more substantial than the hope that he would be transferred to another prison.

Petitioner tries to analogize these cases to the present case by stating that just as a prisoner has no property interest in hoping for parole or commutation of sentence, Respondent has no property interest in having forfeiture remitted or mitigated. Such reasoning ignores the fact that Respondent has a substantial property interest in his automobile and a substantial liberty interest in not being detained without his automobile. He further has an expectancy that his automobile will not be seized.

Furthermore, Respondent has committed no crime nor, as this Court stated in The One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234 (1972) did the government have to show, nor has the government in this case attempted to show, that Respondent had any intent to violate any laws of the United States. The District Court found and the Court of Appeals affirmed merely that Respondent failed to declare his car at the border. Furthermore, both the immigration officer who questioned Respondent and the customs officer who seized the automobile testified that they had no reason to believe that Respondent intended to avoid the customs laws (Tr. 123, 164).

Petitioner is comparing Respondent to a person convicted of a felony. Respondent is not in the position of one who has been tried

and found guilty after a constitutionally valid process of arrest, arraignment, trial, conviction and right to appeal. Petitioner is arguing that Respondent should be denied his trial in the first place. An extension of Petitioner's argument would eliminate the requirement that even forfeiture proceedings ever be instituted after a seizure under the Customs laws.

Petitioner states that a person who attempts to smuggle a vehicle or contraband across the border should be held to assume the risk of any inconvenience. It was not even remotely suggested by Petitioner at trial or on appeal, or by the courts below that Respondent ever attempted to smuggle a vehicle or contraband across the border.

Petitioner finally attempts to justify a delay in post-seizure hearing by submitting to this Court a declaration of Donald W. Lewis, Director of the Office of Regulations and Rulings, Office of Commercial Operations United States Customs Service. The arguments of Mr. Lewis were neither raised at the trial court nor at the first hearing before the court of appeals.

The allegations of Mr. Lewis' affidavit can be considered by the trial court on remand as evidence of one factor, "the reason for the delay." It is entirely improper for Petitioner to make a part of the record out of court statements of fact by a person whom Respondent was never given an opportunity to cross-examine.

The argument that petitions would be denied as a matter of course, with a resulting deluge of forfeiture actions, is untenable. Customs could evolve a procedure for obtaining waivers to allow the government to continue its investigation prior to denying the petition.

Petitioner urges at page 14 of its petition: "The result of the court's holding is that, unless a petition is decided almost immediately, every case will give rise to a triable issue of a due process violation." This plea is nothing

more than the "floodgates" argument, which every first year law student is taught to reject. The Court should not reject the applicability of the due process clause because it will "give rise to a triable issue" in case the government acts unreasonably.

In footnote 6, App. p. A-8, the court of appeals carefully reconciled $8850 with Stypman v. City and County of San Francisco, supra, and Lee v. Thornton, supra. Recognition of the special situation involved with government seizure of automobiles at border points was valid when it was made by Lee v. Thornton, supra, and is valid as made by the court of appeals in this case. Not every individual faced with seizure of his automobile will have the resources to post a bond for its full value and wait an indefinite period for consideration of his petition for remission. There is a sound practical basis for the special recognition of problems in automobile seizures noted by the court of appeals. The decision in $8850 did not purport to denegrate those factors. The court of appeals has set forth reasonable guidelines to give relief to persons who might suffer injuries from delay, while reserving to Petitioner the full right to explain and justify its procedures. The court of appeals properly directed the trial court to apply the factors of $8850 to the facts of the case at bar.

Petitioner has made no showing which would justify appropriation of this Court's valuable time to prolong this litigation.

CONCLUSION

In light of the foregoing it is respectfully submitted that the petition for writ of certiorari be denied.

Charles L. Birke
SANDLER and ROSEN
Attorneys for Respondent
John Von Neuman

APPENDIX A.

Opinion of the United States Court of Appeals

Reported at 7.29 F.2d 657

This case was remanded by the United States Supreme Court for further consideration in light of United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, _____ U.S. _____, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) (hereinafter referred to as $8,850). The issue on remand is whether the United States Bureau of Customs (Customs) violated due process in handling an administrative petition for remission or mitigation of the forfeiture of an automobile seized at the border. In our earlier decision, we held that Customs violated John von Neumann's due process rights by failing to process von Neumann's petition for over a month after the petition was filed. See Von Neumann v. United States, 660 F.2d 1319, 1326 (9th Cir. 1981). After reconsideration in light of $8,850, we reaffirm our earlier conclusion that due process rights attach to the processing of a petition for remission. We remand to the district court, however, for determination of whether the delay violated von Neumann's due process rights.

FACTS

Our earlier decision fully explored the events surrounding the seizure of von Neumann's 1974 Jaguar Panther automobile at the United States border checkpoint of Blaine, Washington on January 20, 1974. See 660 F.2d at 1321-22. In brief, von Neumann shipped the automobile from Switzerland, where he had purchased it, to

Vancouver, Canada, where he obtained a release from Canadian authorities to transport the automobile to the United States. At the Blaine checkpoint, von Neumann failed to declare the automobile and Customs seized the vehicle pursuant to 19 U.S.C. §1497 (1976).[1]

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred" pursuant to 19 U.S.C. §1618 (1976),[2] in which

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[1] 19 U.S.C. §1497 (1976) provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[2] 19 U.S.C. §1618 (1976) provides in part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such a fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating cir-

he stated that he had intended to deliver the Canadian release papers to Canadian Customs, but had mistakenly arrived at the United States Customs instead. On February 3, von Neumann posted a cash bond of $24,500 to secure release of the vehicle. Customs acted on the petition on February 25 and informed von Neumann that the penalty for failing to declare the car was reduced to $3,600. The Regional Commissioner of Customs subsequently upheld this determination on April 14. On remand, von Neumann argues that the delay by Customs in acting on his petition from January 20 to February 25 constituted a denial of due process.[3]

DISCUSSION

I.

Due Process Right to a Prompt Determination of the Petition

In our original decision on this appeal, we held that "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C.

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cumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or to order discontinuance of any prosecution relating thereto.

[3] The Supreme Court decision in $8,850 does not disturb our earlier decision upholding the initial seizure of the vehicle under 19 U.S.C. §1497. We therefore affirm the district court's determination that von Neumann violated section 1497 and that seizure of the vehicle was proper.

§1618." 660 F.2d at 1326. Subsequent to our decision, the United States Supreme Court rendered its decision in United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, ____ U.S. ____, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), which prompted this remand. We therefore reexamine our earlier holding in light of $8,850.

In $8,850, claimant Mary Vasquez failed to declare to Customs on September 10, 1975, that she was transporting monetary instruments exceeding $5,000 into the United States, a violation of section 231 of the Bank Secrecy Act of 1970, 31 U.S.C. §1101 (1976). Customs subsequently discovered $8,850 in currency in Ms. Vasquez's possession, and seized it from her pursuant to 31 U.S.C. §1102 (1976). A week later, Vasquez filed a petition for remission or mitigation. Throughout the remainder of 1975 and until May 1976, the Customs Office of Investigation conducted an investigation to determine whether the seized currency was part of a narcotics transaction. In May 1976, Customs referred the case to the United States Attorney, recommending that Vasquez be prosecuted for the reported violation. During the ensuing criminal prosecution, Customs withheld determination of the petition for remission because the currency was needed as evidence at the criminal trial. Vasquez was convicted of the ciminal violation on December 24, 1976.[4] On March 10, 1977, Customs denied the petition for remission, and referred the claim of forfeiture to the United States Attorney.

On appeal before the Supreme Court, Vasquez argued that the Government's dilatory process-

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[4] The conviction subsequently was reversed because the court files were left in the jury room during deliberations. United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979).

ing of the petition and 18-month delay in filing the judicial forfeiture action violated due process. The Government countered that there was no general due process requirement of prompt post-seizure filing of a judicial forfeiture action; only a deliberate delay by the Government in order to gain an unfair tactical advantage, or a reckless disregard by the Government of the prejudical impact of delay on the defendant, could justify dismissal of the forfeiture action. The Court found, however, that due process required a prompt filing of the forfeiture petition. _____ U.S. at _____, 103 S.Ct. at 2011. The Court adopted a four-part balancing test in order to determine whether the delay between the seizure and the filing of a judicial forfeiture action under 31 U.S.C. §1102 violated the claimant's due process rights. Id.

$8,850 presented a somewhat different issue from that arising in the instant case.[5] A

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[5] The Bank Secrecy Act, at issue in $8,850, contains its own remission provision. See 31 U.S.C. §1104 (1976). Von Neumann's petition, by contrast, was filed under 19 U.S.C. §1618 (1976). Claimant Vasquez, in $8,850, argued that the Government's dilatory processing of her petition for remission and the dilatory commencement of a civil forfeiture action vilated her right of due process. _____ U.S. at _____, 103 S.Ct. at 2010. Both the Court of Appeals and the Supreme Court however, focused only on whether the delay in filing the forfeiture action violated due process. See $8,850, _____ U.S. at _____, 103 S.Ct. at 2010-11; 645 F.2d 836, 838 (9th Cir. 1981). Neither court directly addressed the issue we reach here, the due process requirement of prompt processing of the petition for remission.

Although the Court did not directly discuss

claimant may have a more compelling constitutional claim to a prompt review of the forfeiture by an independent judicial officer than he has to an administrative review of the forfeiture by Customs itself. Further, the substantive disposition of remission petitions is committed to Customs' discretion, and we will not review the merits of a claimant's petition. United States v. One 1972 Mercedes-Benz 250, 545 F.2d 1233, 1236 (9th Cir. 1976). $8,850, therefore does not necessarily impel the conclusion that due process requires a prompt determination of petition for remission or mitigation under 19 U.S.C. §1618.

Nevertheless, the Supreme Court's holding in $8,850 reinforces our earlier view that due process rights attach to the processing of the petition for remission. As we observed in our earlier decision in this case:

> [f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the confiscated vehicle.

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whether a delay in the processing of a petition for remission might violate due process, it does offer some guidance on the issue. The Court stated that an important justification for delay "is to see whether the Secretary's decision on the petition for remission will obviate the need for judicial proceedings." $8,850, _____ U.S. at _____, 103 S.Ct. at 2013. It further emphasized that delay in the processing of a petition can favor both claimant and Government. Id. We understand the thrust of the Supreme Court's opinion to be that delay can benefit a claimant, rather than deprive him of due process, by avoiding costly and formal judicial proceedings. Id.

660 F.2d at 1326, quoting United States v. One 1970 Ford Pickup, 564 F.2d 864, 866 (9th Cir. 1977). We find nothing in $8,850 to disturb this conclusion. Consequently, we reaffirm our holding that due process requires Customs to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. §1618.

II.

Application of Due Process Standards to the Processing of Von Neumann's Petition

In our earlier decision, we noted that neither judicial decisions nor administrative regulations had established standards for prompt action in the administrative consideration of a petition for remission. See 660 F.2d at 1326. This absence of standards prompted the court to establish guidelines to ensure the due process rights of administrative claimants. Id. Specifically, we held that in cases involving vehicles of transportation, the district director should, whenever feasible, act on a petition for remission or mitigation within 24 hours of receipt. 600 F.2d at 1327.

Upon reconsideration in light of $8,850, however, we are persuaded that our attempt to set specific time frames for the processing of administrative petitions was ill-advised. Instead, we are guided by the Supreme Court's teaching in $8,850, that "due process is flexible and calls for such procedural protections as the particular situation demands." ____ U.S. at ____, 103 S.Ct. at 2012, quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Due process inquiries necessarily must proceed on an ad hoc basis, and the outcome will depend on the facts of the particular case.

The analysis employed by the Supreme Court in $8,850 provides an appropriate framework for

determining whether the delay here violated von Neumann's due process rights. To determine whether government delay had abridged due process, the $8,850 Court examined four factors: the length of the delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant occasioned by the delay.[6] ____ U.S. at ____, 103 S.Ct. at 2011-12. See also Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). The Court noted that:

> none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides

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[6] We find the due process analysis of $8,850 to be compatible with the balancing approach of Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1342 (9th Cir. 1977), and Lee v. Thornton, 538 F.2d 27, 33 (2d Cir. 1976), upon which we relied in our earlier decisions. To determine whether due process had been satisfied, Stypmann and Lee balanced the interest of the government against the interest of the individual. This analysis necessarily required some consideration of the length of the delay, the reason for the delay, the claimant's assertion of his right, and the prejudicial impact of the delay upon the vehicle's owner. In our earlier decision, for example, we noted that Customs might take somewhat longer than 24 hours to process the petition if unusual circumstances so required. 660 F.2d at 1327 n. 16. Nevertheless, we expressly adopt here the due process analysis of $8,850 in order to make clear the factors that have weight in the balancing process, and to avoid any suggestion that the different terminology of Lee and Stypmann results in a fundamentally different balancing test.

> in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

_____ U.S. at _____, 103 S.Ct. at 2012.

Because the outcome depends heavily on the facts, the balancing of these four factors properly should occur first in the district court. Consequently, we remand to the district court for consideration of whether the due process requirement of fairness has been satisfied here, in light of the $8,850 test.

Without any way attempting to foreclose the district court's decision, however, we feel it is appropriate to suggest several factors the court may wish to consider in reaching its determination. As $8,850 noted, the overarching factor is the length of delay, which acts to some extent as a "triggering mechanism" for due process analysis:

> [W]hen a delay becomes presumptively improper . . . necessarily depends on the facts of the particular case. . . . Obviously short delays--of perhaps a month or so--need less justification than longer delays.

$8,850 at 4590.[7] To this we would add that the propriety of the delay may turn to a great extent upon the nature of the item that has been seized. We have previously recognized the special hardships imposed on persons

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[7] The $8,850 Court found that the Government's 18 month delay in filing the petition for forfeiture did not violate due process because the delay was caused by an ongoing criminal investigation and prosecution. _____ U.S. at _____, 103 S.Ct. at 2014-15.

deprived of the use of their automobiles:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. Lee v. Thornton, supra, 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process reparable circumstances, held that due process required action on a petition for rescission ["remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1344 (9th Cir. 1977). The potential consequences may be particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point. See Lee v. Thornton, 538 F.2d 27, 31 (2d Cir. 1976).

Closely allied to the length of delay is the reason the Government assigns to justify the delay. $8,850, _____ U.S. at _____, 103 S.Ct. at 2012-13. The record here provides no obvious reason for the Government's one-month delay in processing von Neumann's petition, although we note that Customs processes a great number of petitions each year.[8] It ap-

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[8] The Customs Service processes over 50,000 noncontraband forfeitures per year. In 90% of all seizures, the claimant files an administrative petition for remission or mitigation. The Secretary grants at least partial relief for an estimated 75% of the petitions. $8,850, _____ U.S. at _____, 103 S.Ct. at 2009.

The Supreme Court in $8,850 recognized that

pears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition. Von Neumann had admitted both the origin of the vehicle and his failure to declare the automobile. There is no suggestion that von Neumann or the vehicle might have been involved in illegal activity other than the reporting violation and that Customs delayed processing the petition to allow an investigation as in $8,850.[9]

It is also undisputed that von Neumann filed his petition for remission at the time his vehicle was seized, which seems a sufficient assertion of his rights.

The final factor in the analysis is the prejudice to the individual caused by the delay. In addition to possible loss of essential witnesses or evidence, a claimant may also be prejudiced by unanticipated, unrecoverable, expenses resulting from a seizure of his vehicle, sudden disruption of travel plans, inconvenience, or even peril, he thereby experiences. See, e.g., Stypmann, 557 F.2d at 1342-43; Lee, 538 F.2d at 33.

After weighing these and such other factors the district court considers relevant, the court

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delays of a month or so require less explanation than more lengthy delays. That Court, however, did not imply that no explanation at all is required. Id. at _____, 103 S.Ct. at 2012-13.

[9] The investigation in $8,850 required responses from state, federal and Canadian law enforcement officials. The Supreme Court found no evidence that the Government had not pursued its investigations diligently in $8,850, or that delays in the ciminal prosecution were caused by the Government. $8,850 at _____, 103 S.Ct. at 2012-13.

should determine whether the delay violated due process and enter an appropriate judgment.

CONCLUSION

The district court's finding that von Neumann violated 19 U.S.C. §1497 by failing to declare his car is not clearly erroneous; therefore the seizure of his car was proper. We remand, however, for determination of whether the delay in processing von Neumann's petition for remission or mitigation violated his due process right to prompt consideration of his claim, in light of the $8,850 balancing test.

AFFIRMED in part and REMANDED in part.

APPENDIX B

Opinion of the United States Court of Appeals

Reported at 660 F.2d 1319

This appeal presents the issue of whether the procedures followed by the United States Bureau of Customs (Customs) in processing an administrative petition for remission or mitigation of the forfeiture of an automobile seized at the border for failure of the owner to make the required declaration, were consistent with due process. John von Neumann's foreign-bought car was seized by Customs officials at the Canadian-United States border after he failed to declare the car upon entering the United States. On the day of the seizure, von Neumann filed an administrative claim for remission or mitigation, and later recovered the car after posting a bond as security. Over a month after the petition was filed, Customs remitted $20,900 to von Neumann, but retained $3,600 as a penalty.

Von Neuman filed a complaint in district court, challenging the penalty and the procedures used to assess it. The district court found that von Neumann violated 19 U.S.C. §1497 by failing to declare the car and thus the seizure was proper. Additionally, the court found that the remission procedure was proper. We agree that seizure was proper under section 1497, but find fatal due process violations in the remission procedure.

FACTS

In 1974, von Neumann purchased a 1974 Jaguar Panthar automobile in Switzerland and shipped it to Vancouver, Canada. Prior to shipment, von Neumann registered the car in

California and obtained California license plates. On January 20, 1975, von Neumann picked up the car in Vancouver and obtained a release from Canadian Customs to take possession. Canadian Customs officials gave von Neumann form A8A, which authorized transportation of the car to the border, and instructed him to deliver the form to the Canadian Customs border station before leaving the country.

Von Neumann and a friend arrived at the United States border checkpoint at Blaine, Washington at 5:00 p.m. on January 20. The Blaine checkpoint is across the highway and slightly south of the Canadian border station. The highway approaching the Blaine Station is a multilane highway with several turnoffs for the Canadian Customs building. Von Neumann testified that he inadvertently passed the Canadian station because of poor visibility and inadequate directions. For whatever reasons, von Neumann arrived at the Blaine checkpoint without having delivered form A8A to Canadian Customs.

At the Blaine checkpoint, von Neumann and his passenger were briefly questioned by United States Immigration Officer Perkins.[1] Canadian Customs officials had earlier allerted United States Customs that von Neumann's car would be crossing the border, and Perkins matched the description to the car before questioning the occupants. Perkins asked questions relating to citizenship, and specifically asked von

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[1] Harley Perkins was an Inspector for the Immigration and Naturalization Service, but had been serving as a designated Customs Officer since August 16, 1974. See 19 U.S.C. §1401(i). His designation form indicates that he was to receive training necessary to serve as a Customs Inspector for arriving vehicles, aircraft, and vessels.

Neumann whether he had anything to declare. When von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the case to Customs Inspector Morrison. Upon being asked why he had not declared the car, von Neumann explained that he did not think he was required to declare it. Morrison then seized the vehicle pursuant to 19 U.S.C. §1497.[2]

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred," see 19 U.S.C. §1618,[3] explaining that he had intended to deliver the Canadian Customs papers to Canadian Customs but had mistakenly arrived at United States Customs instead. After filing the petition, von Neumann arranged for other transportation into the United States, and left his car with Customs.

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[2] 19 U.S.C. §1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[3] 19 U.S.C. §1618 provides in part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the

On February 3, 1975, von Neumann posted a bond for $24,500, the value of his car,[4] and Customs returned the vehicle. On February 25, 1975, the Seattle Director of the Bureau of Customs[5] informed von Neumann that the penalt for failing to declare the car was being reduced to $3,600, and therefore $20,900 would be refunded. Von Neumann requested administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment.

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sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

[4] Customs officials have the discretion to release a seized vehicle if the person claiming an interest has a "substantial interest therein." 19 U.S.C. §1614. In this case Customs required a bond for whit it considered the value of the car, as security to cover the penalty assessed. See 19 C.F.R. §§162.41(a), 162.43, 162.44(b) (1980).

[5] By statute, the Secretary of the Treasury acts on petitions for remission or mitigation. 19 U.S.C. §1618. This authority has been dele-

Having exhasuted his administrative remedies, von Neumann filed a complaint in district court on October 14, 1975, seeking: (a) return of the $3,600; (b) injunctive relief to prevent Customs from placing his name on a computer list of violators; (c) a declaration that the seizure and penalty were unlawful.[6] The district court found that von Neumann violated 19 U.S.C. §1497, and therefore seizure of the car was proper. The court also found that the remission and mitigation procedures were proper, and entered judgment for the government. Von Neumann appeals, challenging the imposition of the penalty as well as the procedures followed by Customs.

DISCUSSION

I.
Violation of 19 U.S.C. §1497

Von Neumann contends that the district court erred in finding that he violated section 1497,

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gated to district directors in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. §171.21 (1980). The estimated value of von Neumann's car, $24,500, thus fell within the district director's regulatory authority.

[6] Customs filed a counterclaim requesting recovery of the full $24,500 in accordance with 19 U.S.C. §1497. This claim was apparently based on the argument that since Customs has complete discretion over a petition for remission, von Neumann's challenge reopened the determination and Customs could now assess the full penalty value for the failure to declare. See United States v. One 1972 Mercedes-Benz 250, 545 F.2d 1233, 1236 (9th Cir. 1976). The

because he was never given adequate opportunity to declare the car. The district court's determination that von Neumann was given an adequate opportunity to declare and yet failed to declare his car is a factual one, which we will not overturn unless clearly erroneous. United States v. Wagner, 434 F.2d 627, 628-29 (9th Cir. 1970). See Vesey v. United States, 626 F.2d 627, 629 (9th Cir. 1980). The record fully supports the district court's conclusion that von Neumann attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so.

Officer Perkins testified that he asked von Neumann if he had purchased or acquired anything outside of the United States that he was bringing back into the country,[7] and then asked if he had anything to declare. Von Neumann thus had two opportunities to declare the car, yet failed to do so.[8] It is irrelevant whether von Neumann was looking for the Canadian Customs building and did not intend to enter the United States without declaring the car. As the Supreme Court has held,

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district court denied Custom's counterclaim, and Customs has not appealed that aspect of the judgment.

[7] Von Neumann claims that Perkins asked whether he had purchased anything in Canada, and he responded negatively because the car was purchased in Switzerland. Perkins testified that his questioning was not limited to purchases in Canada, but included acquisitions anywhere outside the United States. The district court apparently credited Perkins' testimony.

[8] We note also that von Neumann was an experienced importer who had been shipping automobiles between Europe and the United States for over

> "[t]o succeed in a forfeiture action under §1497 . . . the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent."

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234, 93 S.Ct. 489, 491, 34 L.Ed.2d 438 (1972). In demonstrating that von Neumann failed to declare the car, Customs has shown that the car was subject to forfeiture and that its owner is "liable to a penalty equal to the value of such article [the undeclared car]." 19 U.S.C. §1497.

Von Neumann argues that because Customs regulations required a written declaration for articles exceeding $25 in value, his oral statement failing to declare the car did not constitute a violation of section 1497. 19 C.F.R. §148.-12(b)(2) (1980). This argument is without merit. Perkins was not under any obligation to request a written decLaration until von Neumann had orally declared the car, nor did von Neumann ever attempt to submit a written declaration.

Von Neumann's final argument is that he was entitled to amend his declaration up until the time his baggage was searched. Although an amendment is proper under Customs regulations, the undeclared item must be "brought to the attention of the examining officer by the passenger." 19 C.F.R. §148.16(a) (1980). Von Neumann failed to do this. Moreover, Customs was not required to search his baggage. The statute states that customs officers

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twenty years, and had personally crossed international borders "innumerable times." In spite of this background, von Neumann failed to mention the car after a specific Customs request.

"may cause an examination to be made of the baggage . . . ." 19 U.S.C. §1496 (emphasis added). Section 1496 does not provide protection from seizure up until the time a formal baggage search is conducted. The "search" took place when Officer Perkins observed the car and matched it to the description provided by Canadian Customs.

The district court's finding that von Neumann failed to declare his car, after an adequate opportunity to do so, is not clearly erroneous. We therefore affirm the district court determinations that von Neumann violated section 1497 and that seizure of the vehicle was proper.[9]

II.

Due Process Challenge to the Administrative Procedure under 19 U.S.C. §1618

A. Petition for Remission or Mitigation

Under 19 U.S.C. §1618, a person whose property is seized and subject to forfeiture may file an administrative petition for remission or mitigation of the penalty. See note 3, supra. In cases where the forfeiture value does not exceed $25,000, the district director may remit or mitigate the penalty "under the law and in view of the circumstances, [as] he shall deem appropriate . . . ." 19 C.F.R. §171.21 (1980). The administrative remission process is independent of a judicial action for forfeiture, which must be initiated promptly. 19 U.S.C. §§1602-04; Seguin v. Eide, 645 F.2d 804, 808

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[9] Because we affirm this portion of the district court judgment, von Neumann is not entitled to have his name removed from Customs' computer list of persons who have failed to declare merchandise, as requested in his prayer for injunctive relief.

(9th Cir. 1981); United States v. One 1970 Ford Pickup, 564 F.2d 864, 866 (9th Cir. 1977). In this case, judicial forfeiture proceedings were never initiated; we are only concerned with the propriety of the administrative procedures followed by Customs.

The substantive disposition of remission petitions is committed to the Customs Bureau's discretion, and we will not review its decision on the merits of a claimant's petition. United States v. One 1972 Mercedes-Benz 250, 545 F.2d 1233, 1236 (9th Cir. 1976). In this case, however, von Neumann is challenging the procedures utilized to reach the substantive decision. Specifically, he claims that the delay of over a month in acting on his petition was a denial of his fifth amendment right to due process.[10]

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[10] Because border seizure is an "extraordinary situation" requiring immediate action, the ordinary due process requirements of notice and hearing prior to deprivation of property are not required. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80, 94 S.Ct. 2080, 2090, 40 L.Ed.2d 452 (1974); Ivers v. United States, 581 F.2d 1362, 1367-68 (9th Cir. 1978). Customs argues that this was the only issue before the district court, and therefore von Neumann is precluded from arguing that a prompt post-seizure hearing is required.

The pre-trial conference order indicates that one of the issues of law to be considered was:

> "Is the procedure which was instituted against Plaintiff and the Automobile, whereby the Automobile may be forfeited and seized, and then remission and mitigation proceedings begun, an unconstitutional violation of the due process clause of the Fifth Amendment to the United States Consti-

B. Due Process Right to a Prompt Determination

The cases interpreting 19 U.S.C. §§1602-04, requiring prompt initiation of judicial forfeiture proceedings, make it clear that due process depends on the circumstances of each individual case. See e.g. Seguin v. Eide, 645 F.2d 804, 808-09 (9th Cir. 1981) (delay of almost 5 months excessive); United States v. One 1970 Ford Pickup, 564 F.2d 864, 866 (9th Cir. 1977) (delay of 11 months excessive); United States v. One 1973 Buick Riviera Automobile, 560 F.2d 897, 901 (8th Cir. 1977) (delay of 5 months justified). The rule in this circuit is that filing of a petition for remission under section 1618 does not excuse Customs from its burden of prompt referral for judicial forfeiture. Ivers v. United States, 581 F.2d 1362, 1372 (9th Cir. 1978).

By contrast, there has been little interpretation of the due process requirements for the remission procedure itself, when judicial proceedings have not been initiated.[11] This is perhaps in part because the statutory language

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tution." The issue is framed in sufficiently general terms to include both pre- and post-seizure due process requirements. Moreover, the case of Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976), which found post-seizure administrative delay to be a due process violation, was cited and discussed below. We therefore conclude that the propriety of the post-seizure administrative delay is properly before this court.

[11] A panel of this court recently held that the owner of a vehicle seized for a drug violation under 21 U.S.C. §881(a) did not have a due process right to aprobable cause hearing within

authorizing remission does not place any time restrictions on Customs, while the judicial referral statutes use the terms "immediately," "promptly," and "forthwith". Compare 19 U.S.C. §1618 and 19 C.F.R. §§171.11-171.33 (1980) with 19 U.S.C. §§1602-04. The absence of stautory language does not eliminate the constitutional requirement of due process, however. The informal, remedial nature of the administrative petition makes rapid processing essential.

The purposes of the section 1618 remission process have been described as follows:

> [F]irst, to permit an administrative review of the propriety of the seizure and the equities involved before any formal court action begins, and second, to give a claimant to seized property a quick, expeditious method of getting his property back without the necessity of hiring a lawyer to defend a court proceeding.

United States v. Eight (8) Rhodesian Stone Statutes, 449 F. Supp. 193, 202 (C.D. Cal. 1978). The need for prompt action is particularly acute where the seized property is an automobile, because "both the necessities and amenities of life may depend upon the availabilities of an automobile when needed." Stypmann v. City and County of San Francisco, 557 F.2d

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72 hours of seizure. United States v. One 1971 BMW 4-Door Sedan, 652 F.2d 817, at 819-820 (9th Cir. 1981). The panel found that the strong government interest in enforcing narcotics laws outweighed the individual interest at stake. The One 1971 BMW panel was not faced with a challenge to the promptness of remission procedures, since a petition for remission was never filed. See at 821-822.

1338, 1343 (9th Cir. 1977). See United States v. One 1971 Opel G.T., 360 F. Supp. 638, 641 (C.D. Cal. 1973) (automobile is a rapidly depreciating asset). In this case von Neumann was not only deprived of an asset, he was left without transportation at the border, a potentially serious consequence for many travelers. See Lee v. Thornton, 538 F.2d 27, 31 (2d Cir. 1976).

Lee is the only case directly addressing the due process argument advanced by von Neumann. Lee was accused of using his van to bring undeclared persons, merchandise, and marijuana into the country. The van and merchandise were seized, and Lee was assessed a penalty equal to the value of the van. He was informed that the van and merchandise were subject to forfeiture and that he could file a petition for remission or mitigation under section 1618. Lee filed a petition within a few days of seizure and recovered the van after paying $100, the amount of the reduced penalty.[12]

The Lee court reversed the penalty assessment because Customs failed to provide Lee with a prompt hearing on his remission petition. The court first balanced the serious nature of the individual property deprivation against the inconvenience to government in providing a prompt determination of the legality of the detention. 538 F.2d at 33. An important factor in the individual's interest is the hardship that

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[12] Lee was a consolidated appeal, and the factual circumstances of appellant Rich's cases were similar to Lee's. Although seizure in Lee was pursuant to 19 U.S.C. §§1460, 1594, and 1595a, and in the instant case was pursuant to 19 U.S.C. §1497, Lee was an interpretation of the remission statute at issue here: 19 U.S.C. §1618. 538 F.2d at 31.

even a temporary deprivation of an automobile might cause. See Stypmann, 577 F.2d at 1343; One 1971 Opel G.T., 360 F. Supp. at 641. On the other hand, once a seizure is accomplished, the government's justifications for delaying a hearing are not compelling. Wiren v. Eide, 542 F.2d 757, 761 n.6 (9th Cir. 1976). After balancing the competing interests, the Lee court held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33.

Although not bound by the Second Circuit's holding in Lee, we find its reasoning persuasive. This court expressly relied on the Lee rationale to invalidate a California towing and possessory lien statute[13] in Stypman v. City & County of San Francisco, 557 F.2d 1338 (9th Cir. 1977). The statute in Stypmann granted towing companies, who had possession of a car because of a traffic violation, a possessory lien on the vehicle to insure recovery of towing and storage fees. The court held that this statute could not withstand a due process attack because it did not provide for a prompt post-seizure hearing to determine probable cause for the seizure. The Stypmann court stated:

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[13] Cal. Veh. Code §22851.

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. Lee v. Thornton, supra, 538 F.2d at 33, a case involving seizure and detention of automobiles in compa circumstances, held that due pro quired action on a petition for re [remission?] or mitigation within and, if the petition was not gran a hearing on probable cause with hours.

Id. at 1344 (footnote omitted).[14] Lee was also cited for the propositions that a car is an important individual asset, id. at 1342 n.8 & 1344 n.22, and that a court must balance governmental and individual interests to determine due process, id. at 1342.

The government contends that Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978), stands for the proposition that the due process requirements of prompt notice and hearing only apply to judicial forfeiture proceedings, not administrative proceedings under 19 U.S.C. §1618. The issue in Ivers, however, was whether the filing of an administrative petition operated as a waiver of a claimant's right to a prompt forfeiture action. The court held that it did not. Id. at 1370. In dicta, the Ivers court stated:

> Administrative consideration of a claimant's petition for remission is not governed by any statutory or regulatory requirement of

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[14] Stypmann held that five days was too long of a delay, but did not establish what time period would be proper 557 F.2d at 1344-45.

promptitutde. Nor does it not afford a claimant the full panoply of due process rights inherent in a judicial proceeding. Remission being a matter of legislative grace, the exercise of the Secretary's discretion is not reviewable by the courts. Id. at 1371. The tone of this statement indicates that the word "not" in the second sentence may be a misprint. It seems that the court was merely emphasizing the informal nature of the administrative process. We agree that an administrative hearing does not require all the protections of a judicial hearing, but we believe a claimant is entitled to prompt disposition of an administrative claim.

The balance of the Ivers opinion suggests that due process does require a prompt resolution of administrative claims. The court noted that administrative proceedings are informal and inexpensive, and will often obviate the need for judicial action since remission petitions are frequently granted. Id. at 1370. If time limits are not imposed on the administrative process, the government might be forced to bring a judicial action prior to the completion of the administrative claim. Once a case is referred for judicial action, the administrative proceedings on a petition for remission must cease. 19 C.F.R. §171.2(a) (1980). Therefore delay in ruling on a claimant's petition could force a more cumbersone and timeconsuming judicial forfeiture action. See Ivers, 581 F.2d at 1370, United States v. Eight (8) Rhodesian Stone Statutes, 449 F. Supp. 193, 202 (C.D. Cal. 1978). The rationale of the Lee case is further supported by cases from this circuit. In United States v. One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977), we stated: "[f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient

determination of the property rights in the confiscated vehicle." Id. at 866 (referring to various stages of the judicial forfeiture procedure). The United States District Court for the Central District of California, citing Lee, noted that "[a] growing number of decisions enunciate the proposition that both the adjudication of the administrative claim and the filing of a court action when required, must be speedily done." Eight (8) Rhodesian Stone Statues, 449 F. Supp. at 200 (emphasis added). See also Pollgreen v. Morris, 496 F. Supp. 1042, 1051-53 (S.D. Fla. 1980) (invalidating seizure of vessels used in Cuban "Freedom Flotilla" for failure to provide prompt post-seizure hearings; relying on Lee and Stypmann); F/V American Eagle v. State, 620 P.8d 657, 666-67 (Alaska 1980) (citing Lee and Stypmann for the proposition that a post-seizure hearing must be prompt even when the government interest is "urgent"). We therefore adopt the Lee rationale and hold that due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. §1618. The one month delay in processing von Neumann's petition does not conform to this standard.

C. What constitutes a Prompt Determination

We have concluded that Customs must act on a remission petition promptly and that the one month delay in processing von Neumann's petition was unreasonable. This court has not yet formulated specific standards, but we are guided by the Stypmann court which held that a five-day delay in providing a hearing violated due process. Stypmann v. City and County of San Francisco, 557 F.2d 1338, 1344 (9th Cir. 1977). Although Customs regulations provide specific requirements for remission petitions, including a 60 day limitation on filing a peti-

tion, the regulations do not place any time constraints on administrative consideration of a petition. 10 C.F.R. §171.12(b) (1980); See generally 19 C.F.R. §§171.11-171.33 (1980).

In the absence of any appropriate regulatory provisions, we find that the imposition of guidelines is necessary to ensure the due process rights of administrative claimants. No showing has been made that the time limits set by the Second Circuit in Lee have proved unreasonably burdensome. We hold that in cases involving vehicles of transportation within a district director's authority under 19 C.F.R. §171.21 (1980),[15] the director must ordinarily, depending upon the nature of the article seized,[16] act on a petition for remission or mitigation within 24 hours of receipt. The claimant must be allowed the opportunity to make an oral appearance to argue his or her claim. Because the

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[15] The district director has authority to act in cases involving a total value of merchandise not exceeding $25,000. See note 5 supra. The due process requirements for cases involving greater value than $25,000, which are decided by the Commissioner of Customs, are not before us. See 19 C.F.R. §171.11(a) (1980). We note that the greater the value of the merchandise, the greater the potential for a burden on individual rights. On the other hand, the administrative machinery may need more time to operate when the district director is not authorized to act.

[16] Unlike the court in Lee, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process.

administrative delay in processing von Neumann's petition violated his due process rights, we reverse and remand with instructions to enter judgment for von Neumann in the amount of $3,600 plus costs. See Lee, 538 F.2d at 33.

CONCLUSION

The district court finding that von Neuman violated 19 U.S.C. §1497 by failing to declare his car is not clearly erroneous, therefore the seizure of his car was proper. The delay in processing von Neumann's petition for remission or mitigation, however, violated his due process right to prompt consideration of his claim. Because we hold that Customs must ordinarily act on a petition for remission within 24 hours of receipt, we reverse and remand with instructions to enter judgment for the plaintiff.

AFFIRMED in part, REVERSED AND REMANDED in part.

APPENDIX C

Order Modifying First Opinion of the Court of Appeals

The Opinion in the above-entitled case is modified as follows:

(1) At page 5512 of the slip opinion, second paragraph, left column, the third sentence is amended to read:

> We hold that in cases involving vehicles of transportation within the director's authority under 19 C.F.R. §171.21 (1980),[15] the director should whenever feasible[16] act on a petition for remission or mitigation within 24 hours of receipt.

(2) Footnote 16 is amended to read as follows:

> [16] Unlike the court in Lee, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of essential information or of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process. We further do not foreclose the promulgation of a regulation setting forth any appropriate standard in accordance with the principles set forth in this opinion.

The panel as contituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the sugges-

tion. Fed. R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Office - Supreme Court, U.S.
FILED
APR 19 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1144

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1144

UNITED STATES OF AMERICA, PETITIONER

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JOHN VON NEUMANN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. Respondent's brief in opposition completely misses the point of this case. The government does not dispute that forfeiture proceedings are subject to due process and that an individual is entitled to a hearing before his property is forfeited. See Pet. 13 n.10. This adequately protects respondent's property interest in his automobile (see Br. in Opp. 8), and this is the only due process right recognized by this Court in *United States* v. *$8,850 in United States Currency,* 461 U.S. 555 (1983). But remission or mitigation is a discretionary administrative remedy that is wholly distinct from the questions whether the property was properly seized or is forfeitable. This remedy, like commutation of a sentence, is a matter of grace; there is no right to such an administrative remedy, no right of judicial review of the administrative determination, and no reason why the Constitution should be read to require that the remission or

mitigation decision be made within a particular time, much less the extremely short time frame contemplated by the court of appeals. See Pet. 10-15.[1]

2. Respondent relies on *Lee* v. *Thornton,* 538 F.2d 27 (2d Cir. 1976), as establishing a special rule for passengers stranded by the seizure of automobiles at the border. For the reasons stated in our petition, *Lee* is wrongly decided. At any rate, it appears that its rule is being extended well beyond the situation of persons stranded at the border. In this case, it is clear that respondent was not left stranded by the seizure of his automobile (see Pet. 18). More significantly, the Second Circuit, relying on *Lee* and the decision below, has recently extended those cases in a very unsettling way, recognizing the possibility of individual *Bivens* liability for undue delay in processing a petition for remission or mitigation in a situation where the claimant failed to take appropriate action to facilitate the rapid return of his vehicle.

In *Johns* v. *McKinley,* 753 F.2d 1195 (2d Cir. 1985), an individual's truck was seized as forfeitable when he tried to smuggle an alien across the border. Twenty days after the seizure — only a day before the government commenced judicial forfeiture proceedings — Johns filed a petition for remission or mitigation of the forfeiture. Sixty-five days

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[1]Indeed, respondent seems to recognize the unreasonableness of his position when he suggests that Customs "could evolve a procedure for obtaining waivers" to allow the government time adequately to consider remission petitions (Br. in Opp. 9). If the only due process right at stake here is one that the individual will gladly waive, the supposed right cannot be of much real significance. Moreover, if the right is going to be waived in almost all cases, it is apparent that respondent's contention has no broader impact than to allow him to secure the windfall of escaping any penalty at all (and presumably the customs duty as well) for attempting to bring his Jaguar into the country in violation of the customs laws.

later, the government granted the petition in part. The court of appeals reversed the district court's holding that the time taken to act on the petition did not violate due process. The court of appeals ordered the case remanded in order to determine whether a *Bivens* action should lie against the Assistant Attorney General of the Criminal Division for unreasonably delaying action on the petition or against the Commissioner of Immigration and Naturalization for failing to promulgate regulations that would lead to faster action on such petitions.

By adding the specter of individual liability based upon short delays in processing remission and mitigation petitions, both for agency heads and for individuals involved in processing the petitions, the *Johns* decision further encourages government officials to give short shrift to mitigation petitions in the interest of speedy disposition or to curtail severely the availability of the remedy (see Pet. 20-24). If claimants are to retain the benefits of the mitigation remedy, therefore, it is important for the Court to grant certiorari here and reverse the court of appeals' erroneous application of the Due Process Clause.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

APRIL 1985

DOJ-1985-04

No. 84-1144

Office • Supreme Court, U.S.
FILED
JUN 27 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 15, 1985
CERTIORARI GRANTED, APRIL 29, 1985

BEST AVAILABLE COPY

TABLE OF CONTENTS *

	Page
Relevant docket entries	1
Petition for Remission or Mitigation, dated January 20, 1985	12
Supplement to Petition for Remission or Mitigation, dated February 12, 1975	13
Letter from D. Eide to L. Finegold reflecting remission decision, dated February 25, 1975	17
Letter from L. Finegold to D. Eide invoking Customs review procedures, dated March 4, 1975	18
Letter from D. Eide to L. Finegold reciting Regional Commissioner's decision, April 14, 1975	20
Order granting certiorari	21

* The opinions below are printed in the appendix to the petition for writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 75-3453

JOHN VON NEUMANN

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/14/75	Fld complt. Issd summs. sam
11/5/75	Fld Pltgvs retrn summs serv 3. ct
12/12/75	Fld Stip and ORD ext'g ti to defts to 1/16/76 to ans the Complt. jcd
1/12/76	Fld Stip & ORD ex ti to defts until 1/31/76 to ans, move or otherwise plead to complt. jmr
2/2/76	Fld defts' ANSWER to complaint and COUNTERCLAIMS. jmr
2/13/76	Fld pltf's REPLY to counterclaims. rl Fld pltf's 1st req for docs. jmr
3/3/76	Fld Stip and ORD ext'g date for serving response tp 3/25/76. jcd
3/24/76	Fld defts' response to pltf's 1st req for docs. jmr
11/11/76	Fld defts' ntc of mot & mot, rtnble 12/13/76 at 9:30am, for setting of PTC. rlb

DATE	PROCEEDINGS
12/13/76	MIN ORD: HRNG deft mot for setting P/T/C: Crt Ords defts mot off cal, all cnsl to be pres. Cnsl to re-file mot. rlb
12/17/76	Fld pltf's ntc of mot & mot, rtnble 1/24/77 at 10am, for setting of PTC. rlb
1/17/77	Fld defts notc of tkg deposition of pltf John Von Neumann. Fld defts notc of tkg deposition of Paul R. Ginther. Issd supb. ejb
1/27/77	Fld deposition subp to testify or prod doc or things retnrd not servd as to deft Paul R. Ginther c/o Bill Yates, Inc. ejb
*1/24/77	MIN ORD: Hrg pltfs motn for setting P/T C at 3/17/77 at 4:30pm. Cnsl to comply w/rule 9 & file contentions 1 wk before PTC. ejb
3/2/77	Fld stip & ORD contg PTC retnble 4/28/77, 4pm. sam
3/3/77	Fld pltf's reply to defts' memo in oppos to pltf's motn for prelim inj. sam
3/18/77	Fld pltf's notc of tkg depos of Harley Perkins on 3/24/77, 10:30am. Fld pltf's notc of tkg depos of D.E. Morrison on 3/24/77, 1:30pm. sam
4/15/77	Fld defts' memo of Contentions of Fact & Law. caw
4/14/77	Fld pltf's memo of contentions of fact & Law. caw
4/22/77	LODGED: Pltf's PTC proposed ORD. caw
4/28/77	MIN ORD: PTC HAD. Crt sgns PTC ORD. Crt sets settlmt conf for 10/21/77, 3:00 PM. Crt sets C/T for 10/25/77, 9:30 AM. caw
*4/22/77	Fld Pltf's PTC ORD. caw

DATE	PROCEEDINGS
10/21/77	MIN ORD: Sttlmnt conf, crt & cnsl confer. lb
10/25/77	MIN ORD: Crt Trial 1st da case cont to 10/26/77 8:30AM. lb
10/26/77	MIN ORD: Crt. Trial 2nd da, crt tks trial under submission. lb
6/30/78	MIN ORD: Crt finds for dfts on complt & for pltf & counter dft on X-clm. dft to sub proposed findgs, concl & judgmt. dg
1/12/79	LODGED defts' proposed finds of fact & concl of law. LODGED defts' proposed jdgmt. rlb
1/22/79	LODGED plf's proposed finds of fact & concl. of law. Fld pltf's objs to proposed finds of fact & concl of law; proposed finds of fact & concl of law. rlb
9/20/79	Fld defts' finds of fact & concl of law. Fld jdgmt & ORD thereon that jdgmt be Granted in fv defts & agnst plf & dsmg action & that costs be taxed agnst plf (Ent 9/21/79 ntfd prtys) JS-6. rlb
9/28/79	Fld defts' bill of costs, rtnble 10/5/79, 10am. rlb
10/5/79	Taxed costs in sum of $61.00 agnst plf. rlb
11/16/79	Fld pltf's NOTC OF APPEAL to 9th Cir C/A frm jdgmt ent 9-21-79. lw
11/30/79	Fld plf's designation of Reporter's transcript. rlb
12/28/79	Fld orig Rptr's transc of prcdgs had on 10/25/77 & 10/26/77. fb
3/17/80	Fld plf's designation of record on appeal. rlb
10/6/80	Fld defts x-design of clk's record on appeal. rz
12/3/80	Issd & Fwd to C/A lcc rec on appeal; along w/orig of reptr's transc of prcdgs had on 10/25/77 & 10/26/77. af

DATE	PROCEEDINGS
5/28/82	Lodged judgmt affirmrf inpart reversed & remand inpart. sb
6/11/82	Fld notc of filing hrg on filing & spread on 6-21-82 10am. sb
6/15/82	LODGED PLTF JUDGMNT. sb
6/15/82	Fld pltf delcar re cosy expended. Fld notc of change of filing & spreading of USCA judgmnt 6-21-82 9:30am. sb
6/21/82	MIN ORD: Flng & sprdng US Crt appeals jdgmnt, affirming, reversing & remanding. Deft's req to defer entry of jdgmnt granted. Crt ORDs flng & sprdng of jdgmnt of Crt of Appeals stayed 60 days. mm
6/28/82	LODGED Ord recalling mandate & staying until 8/16/82. nm
8/4/82	Fld deft notc of recall & stay of mandate. lm
9/14/82	Fld notc of hrg on filing & spreading jdmt of Crt of appeals rtnbl 9-27-82 10AM. lm
9/15/82	Fld notc of cont of hrg on filing & spreading of 9th Cir mandate from 9-27-82 to 10-4-82 10AM. lm
9/20/82	LODGED prop jdmt. lm
9/20/82	Fld pltf declar re costs expended. lm
*8/25/82	Lodged from C/A 9th cir copy of jdmt affirming in part & reversing in part & remanding in part USDC. lm
9/24/82	Fld defts' Notc of flg of petn for writ of certiorari and reqst for stay of the flg and spreading of the mandate. jcd
10/4/82	MIN ORD: Filing & spreading of USCCA mandate; defts reqst for stay pending writ of certiorari. Crt ords stay of filing & spreading

DATE	PROCEEDINGS
	of mandate from 9th cir Crt of Appeals until aft the US Supreme Crt has ruled on writ of certiorari. lm
*6/18/82	Fld defts obj to flng & spread & to entry & form of pltfs prop jdmt. lm
12/5/83	MIN ORD: Crt ORDS mandates of USCA 9th Cir lodged w/crt on 5-28-82 & 8-25-82 be placed in file & further actn will be taken by crt upon reissuance of mandate upon Crt of Appeals' final decision. (ENT 12-6-83). sm
10/2/84	LODGED cc ORD—the judgmnt of the USDC is affirmed in part, remanded in part. mb
10/15/84	MO: Flng of mandate is stayd pendng gov's decision re a course of actn; Gov will keep Crt infrmd as to status. Ent 10/19/84. wh
10/19/84	MO: ORD tht case be assnd purs rule 2 to Judge Curtis. Reassigned 10/20. wh
*10/10/84	Jdmt from Ct of Appeals set for hearing on 10-15-84 10am. sa
2/11/85	Stat rpt. deft. sa
5/8/85	LODGED cc ord frm US SUPREME CRT granting petn fr writ of cert. avm

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
1979	
Nov. 26	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. wdt
Nov. 26	Rule 19 (b) billing letter sent. wdt
Dec. 4	RECVD DOCKET FEE PAYMENT NOTIFICATION FORM.
1980	
Jan. 7	Filed, CERTIFICATE OF RECORD (12/28). ss
Jan. 7	Aplt (Von Neumann) opening brief due 2/18/80. ss
Feb. 12	Fld mtn & ord (Clk) gtng Aplt/ext of time to fl opng/brf to: MAR 3, 1980. IGT
Feb. 26	Fld mtn & ord (Clk) gtng Aplt/ext of time to fl opng/brf to: MAR 17 1980. IGT

DATE	FILINGS-PROCEEDINGS
1980	
Mar. 19	Filed orig & 15 aplt's opening briefs & 5 Excerpts. (3/17/80). ogm
Mar. 22	Fld mtn & ord (Clk) gtng/Resp ext of time to fl answg brf to: MAY 17 1980. IGT
May 19	Filed orig & 15 aple's briefs. (5/16/80) ogm
June 2	Filed orig & 15 aplt's reply briefs. (5/30/80) ogm
Dec. 11	FILED as of 1/7 CERT RECORD ON APPEAL IN TWO VOLS, PLDGS, VOL I copy R/T VOL II, orig *ONE ENVELOPE OF EXHIBITS.* pv
1981	
Apr. 1	Filed aplt's motion for continuance of hearing. (panel) 3/27 -db-
Apr. 29	Filed order (Sr. Dpty Clrk for Ct) the aplt's motion for continuance of oral argument is granted. This case shall be removed from the May 5, 1981 Pasadena calendar and shall be rescheduled upon further order of the court -db-
May 13	Filed (IN LA) order (Dpty Clrk for Ct) argument in this appeal has been rescheduled for Wednesday, June 3, 1981, at 10:00 a.m. in the Customs Court on the eighth floor of the Federal Building at 300 North Los Angeles Street, Los Angeles, California. Counsel are requested to check in with the deputy clerk at least thirty minutes prior to the time of argument .-db-
June 3	ARGUED & SUBMITTED BEFORE TANG, BOOCHEVER, CJJ & PRICE, DJ (E.Calif.) -db-
June 12	Filed aple's additional citations. (panel) 6/10 -db-
June 24	Filed, as of Jun 22, aplt's response to aple's additional citations. (panel) 6/18 -db-

DATE	FILINGS-PROCEEDINGS
1981	
Aug. 10	Rec'd ltr dtd Aug. 7, from counsel for aples, re: additional citations. (panel) -db-
Aug. 17	Rec'd ltr dtd Aug 14, from counsel for aplts, re: response to aple's additional citations of ltr dtd Aug 7. (panel) -db-
Nov. 2	ORDERED OPINION (BOOCHEVER) FILED & JUDG TO BE FILED & ENTD. -db-
Nov. 2	filed opinion—affirmed in part; reversed & remanded in part.
Nov. 2	FILED & ENTERED JUDGMENT. -db-
Nov. 19	Filed, as of Nov 12, aples' motion for ext of time to file petition for rehearing (requested ext to 12/16/81) (panel) 11/10 -db-
Nov. 19	Filed order (Dpty Clk) aples have until Dec. 16, 1981, w/in which to file a petition for rehearing or suggestion for rehearing en banc. Issuance of mandate stayed until Dec. 16, 1981. ec
Nov. 19	Filed, as of Nov 5, order (Acting clrk for ct) the opinion, filed on Nov. 2, 1981 is corrected as follows: (see case file) -db-
Dec. 17	Filed an orig & 24 Appellees' Petition for Rehearing and Suggestion For Rehearing En Banc. 12/15 (panel, active judges) ec
1982	
May 18	Filed order (TANG, BOOCHEVER & PRICE*) the opinion is modified as follows: (see case file). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. -db-
May 26	MANDATE ISSUED

DATE	FILINGS-PROCEEDINGS
1982	
June 2	Filed, as of May 27, aples' motion for stay of mandate, or, in the alternative, for recall and stay of the mandate. (PANEL) 5/25 -db-
June 25	Filed order (BOOCHEVER) it is ordered that the mandate issues in the above-entitled case be recalled and that it be stayed to and including Aug. 16, 1982. -db-
Aug. 23	MANDATE ISSUED
Sept. 29	*RECVD SC notice of filing petition for cert on 9/15/82, SC#82-452. pn*
1983	
June 10	Filed SC letter of June 6, 1983, granting writ of cert; the judgment of CA is vacated and the case is remanded to CA for further consideration in light of u.s. v. $8,850 in United States Currency, 461 U.S. —— (1983). pn
June 10	case re-opened—J/S 34 prepared. pn
July 6	Filed order (TANG & BOOCHEVER, CJ & PRICE, DJ) The parties are requested to file simultaneous briefs as to the application of the decision by the United States Supreme Court in the United States v. $8,850 in United States Currency, 461 U.S. (1983, 51 U.S.L.W. 4587. The briefs shall be filed on or before thirty days from the date of this order. pn
July 12	Filed certified copy of SC orders of 6/6/83, granting cert · vacating and remanding CA judgment for further consideration in light of United States v. $8,850 in U.S. Currency, 461 U.S. —— (1983). (copies to panel) pn
July 25	Filed aplt's supplemental brief (5-pgs. orig & 15) 7/19 -panel- ec

DATE	FILINGS-PROCEEDINGS
1983	
Aug. 8	Filed orig & 15 Appellee's Suppl. briefs (21-pgs.) 8/5 -panel- ec
1984	
Apr. 3	As of March 30, 1984, ORDERED OPINION (BOOCHEVER) FILED & JUDG TO BE FILED & ENTERED.
Apr. 3	As of March 30, 1984, FILED OPINION—AFFIRMED IN PART & REMANDED IN PART.
	AS OF MARCH 30, 1984, FILED & ENTERED JUDGMENT. pn
Apr. 11	Filed Motion and Order (Dpty. Clk for Court) appellees have until May 15, 1984 within which to file any petition for rehearing or suggestion for rehearing en banc. (panel) ec
May 15	FILED ORIG & 33 copies of appellees' (USA) PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC. 15 pages 5/14/84 (PANEL & ALL JUDGES) pn
May 21	Filed orig & 3 appellees DECLARATION OF DONALD W. LEWIS, DIRECTOR, ENTRY PROCEDURES & PENALTIES DIVISION, OFFICE OF REGULATIONS AND RULINGS, OFFICE OF COMMERCIAL OPERATIONS, UNITED STATES CUSTOMS SERVICE. (re entry of 5/15/84, pg 11 declaration not duly signed by Donald W. Lewis) (panel) pn This is signed by Lewis.
Sept. 18	Filed Order (TANG, BOOCHEVER, PRICE) The petition for rehearing is DENIED and the suggestion for a rehearing en banc is rejected. 9/18 pw
Sept. 28	MANDATE ISSUED

DATE	FILINGS-PROCEEDINGS
1984	
	RECORD RET'D Date: 3-1-85
	Pldgs: Vol(s) ————
	R/T's: Vol(s) 1 originals
	Exh's: —— Bx, 1 Env ( ) Sealed
	Ctfd Mail No. P718207682
1985	
Mar. 14	Recv'd as of Jan. 28, 1985 Notice of Filing Petition For Certiorari. 1/15/85 SC# 84-1144. pw
May 3	Filed Certified copy of SC order GRANTING Writ of Certiorari as of 4/29/85. bf

BUREAU OF CUSTOMS
19 73, C. R.

BUREAU BUDGET NO. 48-R0469

PETITION FOR REMISSION OR MITIGATION OF FORFEITURES AND PENALITIES INCURRED

DISTRICT	PORT	SEIZURE NO.
Seattle, Wash	Blaine, Wash	75-3004-10982

DESCRIPTION OF MERCHANDISE

1 1974 Jaguar Panther, Calif Lic 688-LYL, Vin ~~3372333~~ 70802

Violation: 19 USC 1497
19 USC 1595a

NAME	ADDRESS
John ~~MEHEAM~~ M. Vonleuman	1505 Rose Ave Palm Springs, Calif

I petition for the release and delivery of the seized above-described merchandise and for relief from the personal penalty incurred because of the following mitigating circumstances.

This car was intented as a gift for Miss. E.G. Blite who is at present unable to join me on holiday in Canada. Her birthday is Jan 26th and in place of her coming to Canada for that occasion I wanted to expedite the cars delivery. The undersigned had no intention of avoiding U.S. customs duties, which is incongruous for someone who has personally and in business imported and paid duties on more vehicles than just about anyone in the U.S. - I have intended to declare customs papers to the Canada Customs, however the first stop was a apparent U.S. Immigration Officer, who ask us about our Citizenship and routine declaration. It was an honest mistake and oversight and before I knew it I was forced into the state of seizure. I respectfully request the above is considered in the

SIGNATURE	ADDRESS	DATE
	Same as above	01-20-75

CUSTOMS FORM 4609 Feb. 69

GPO 862-944

FRANCO, ASIA, BENSUSSEN & COE
Attorneys at Law
602 Tower Building
Seattle, Washington 98101
624-5622

February 12, 1975

Director of the Bureau of Customs,
Donald L. Eide
2039 Federal Office Building
Seattle, Washington 98104

Attn: Mrs. Dee Decker

Re: Seizure No. 75-3004-10982, a 1974 Jaguar Panther, California License No. 688-LEG

Dear Mr. Eide:

On January 20, 1975 Mr. John vonNeumann had the vehicle he was driving seized by Customs Officials pursuant to 19 U.S.C. § 1497 at Blaine, Washington. Mr. vonNeumann denied then and continues to deny that he had any intent to "not include in the declaration and entry" a 1974 Jaguar in which he was returning from Vancouver, B.C. to California.

The following information concerning the events of January 20, 1975 and the background of Mr. vonNeumann is submitted as a supplement to the Petition for Remission or Mitigation of Forfeitures and Penalties Incurred which Mr. vonNeumann filed on January 20, 1975 at the time the vehicle he was driving was seized.

In April 1974 Jon vonNeumann purchased in Europe a 1974 Jaguar Panther automobile for Grace E. Blote of California. Since it was to be a gift for her and intended for use in California, he registered the vehicle in her name with the Motor Vehicle Department of the State of

California. Thereafter, the automobile was shipped from Geneva, Switzerland to Vancouver, B.C. where Mr. vonNeumann and Grace Blote were to pick up the car, visit Canada for several days, and then return to Southern California. When Grace Blote became ill and could not travel, Jon vonNeumann and Paul R. Ginther, on January 20, 1975 flew to Vancouver, B.C. to pick up the car and drive it directly to Los Angeles, California.

At the waterfront in Vancouver, B.C. on January 20, 1975, Canadian Customs released the vehicle to Mr. vonNeumann and provided him with documents which he was instructed to furnish to Canadian Customs at the Blaine border crossing before entry into the United States. Mr. vonNeumann and Mr. Ginther left Vancouver's waterfront immediately thereafter and drove south to the Blaine border crossing.

As they approached the border they looked for the Canadian Customs Office to deliver the papers as instructed. As they recall, they became confused and could not locate Canadian Customs so they decided to follow the normal roadway and the posted arrows. The first building they arrived at turned out to be the United States Immigration Station rather than the Canadian Customs Post. Mr. vonNeumann immediately asked the inspector on duty where Canadian Customs was located. Instead of answering that question the officer in a very short period of time asked Mr. vonNeumann several questions and Mr. Ginther one question.

In a period lasting no more than one minute, during which time Mr. vonNeumann asked about the location of Canadian Customs to no avail, the following questions were asked and answered to the best of his memory:

Q: Are you an American Citizen?
A: Yes.
Q: Does the baggage in the back belong to you and your passenger?
A: Yes.

Q: Are you carrying liquor?
A: No.
Q: Are you carrying firearms?
A: No.
Q: Are you carrying cigarettes?
A: Yes, for personal consumption.
Q: Did you purchase anything while in Canada?
A: No.
Q: Where were you born?
A: Austria
Q: Are you a naturalized citizen?
A: Yes
Q: Where were you naturalized?
A: Salinas, California.

Mr. Ginther was then asked where he was born, to which he responded "Los Angeles, California."

Mr. vonNeumann was next told by the immigration inspector to park his car and follow the inspector which he did. The inspector led him into a building where he was immediately informed by a man later identifying himself as a Customs Inspector that the vehicle was "seized". Interrogation of Mr. vonNeumann followed for approximately three hours at which time he and Mr. Ginther were released.

During the time he was questioned by the first immigration inspector, Mr. vonNeumann was not asked if he had anything to declare, his questions concerning the location of Canadian Customs went unanswered, and he was not given an opportunity to describe his purpose in seeking to locate Canadian Customs. The papers which were to be turned over to Canadian Customs were in full view in the car and were later taken by United States Customs.

Mr. vonNeumann intended to declare and pay duty on the automobile. Either because of haste or impatience on the part of the Immigration Inspector or misunderstanding on the part of Mr. vonNeumann the one minute conversation unjustifiably led to the seizure of the vehicle in question.

Mr vonNeumann is a reputable businessman who during the period 1953 through early 1973 was a major importer and distributor of Volkswagen and Porsche automobiles into the United States. He is familiar with customs laws, duty on imports, and the penalty for failure to make a proper declaration. Mr. vonNeumann has had a successful business career and was well able and prepared to pay duty on the vehicle.

The Customs Service version of the events has not been provided to us. Accordingly, we are not in a position to either agree with or dispute contentions of the individual immigration officer who first questioned Mr. vonNeumann and Mr. Ginther and whose word is relied upon for the seizure. It is our position, however, that Mr. vonNeumann did not intend to import a conspicuous automobile into the United States without paying the lawful duty thereon and that none of his actions show such intent. We welcome any opportunity to attend a hearing in this matter and to submit under oath to questioning concerning this matter.

It is our position that in view of the circumstances, background, and clear potential for confusion, any penalty pursuant to 19 U.S.C. § 1497 would be unwarranted and inappropriate.

If I may provide you with other details please do not hesitate to call upon me.

Very truly yours,

/s/ Laurence B. Finegold
LAURENCE B. FINEGOLD

LBF:js

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Seattle, Wash.

Feb. 25, 1975

Refer to
District Case
No. 75-3004-10982

Franco, Asia, Bensussen & Coe
602 Tower Bldg.
Seattle, WA 98101

Attention: Laurence B. Finegold

Gentlemen:

Your application for relief from liabilities incurred by John vonNeumann for violation of 19 USC 1497, failure to declare a 1974 Jaguar Panther upon entry into the United States at Blaine, Washington on January 20, 1975, has been reviewed. Under the provisions of 19 USC 1497, the vehicle, valued at $24,500 is subject to forfeiture and Mr. von Neumann is liable to a penalty of $24,500.

Consideration has been given to your petition and the reported facts and it is the decision of this office that some relief is warranted. Accordingly, by authority of Section 171.21 Customs Regulations, the forfeiture of the vehicle and the penalty will be remitted upon payment of $3,600. As you have previously paid $24,500 to secure release of the vehicle, a refund of $20,900 will be issued to Mr. vonNeumann. Please allow adequate time for processing of the refund.

Sincerely,

DONALD L. EIDE
District Director

By /s/ E. Phillips
E. PHILLIPS
Fines, Penalties &
Forfeitures Officer

FRANCO, ASIA, BENSUSSEN & COE
Attorneys at Law
602 Tower Building
Seattle, Washington 98101
624-5622

March 4, 1975

Donald L. Eide
Director, Bureau of Customs
2039 Federal Office Building,
Seattle, Washington 98104

Re: Seizure No. 75-3004-10982
a 1974 Jaguar Panther,
California License No. 688-LEG

Dear Mr. Eide:

This letter is written in order to invoke the appropriate Customs review procedures applicable to seizure cases and to obtain your personal review of the above numbered matter.

Your Fines, Penalties and Forfeitures Officer has assessed a penalty of $3,600.00 against my client John vonNeumann.

It is our view that the penalty of $3,600.00 is unwarranted and excessive under the circumstances as previously detailed in my petition of February 12, 1975 directed to your office. (Copy attached).

Accordingly, I respectfully request that you review this entire matter and determine whether the value placed on this vehicle was correct and whether the penalty computed, based on the vehicle value, was fair and just under the circumstances.

Mr. vonNeumann is emphatic in his view that the incident at Blaine was the result of misunderstanding and that he had no intention whatsoever of illegally importing an automobile. His background and reputation, I believe, bear this out.

Please fell free to contact me should you wish any other information on this matter.

Sincerely,

/s/ Laurence B. Finegold
LAURENCE B. FINEGOLD

LBF:kc
Attachment

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Seattle, Wash.

April 14, 1975

Refer to
District Case
No. 75-3004-10982

Franco, Asia, Bensussen & Coe
602 Tower Building
Seattle, WA 98101

Attention: Laurence B. Finegold

Gentlemen:

The above District Case concerns liabilities incurred by John vonNeumann for violation of 19 USC 1497, failure to declare a 1974 Jaguar Panther upon entry into the United States at Blaine, Washington on January 20, 1975.

Our letter of March 10, 1975 informed you that this case had been forwarded to the Regional Commissioner of Customs in San Francisco for his review. It is his decision to uphold our decision of February 25, 1975 to remit the forfeiture and penalty upon payment of $3,600. As this amount was previously paid, this case is now closed on our records.

Sincerely,

/s/ Donald L. Eide
DONALD L. EIDE
District Director

SUPREME COURT OF THE UNITED STATES

No. 84-1144

UNITED STATES, PETITIONER

v.

JOHN VON NEUMANN

ORDER ALLOWING CERTIORARI

Filed April 29, 1985

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 478316 11043

Office-Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1144

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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Deputy Solicitor General

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Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the statutory provision that allows a claimant to petition the Customs Service for discretionary remission or mitigation of penalties for violations of the customs laws creates a property interest subject to the requirements of the Due Process Clause of the Fifth Amendment.

2. Whether, assuming that due process requirements apply to the remission decision, they include a requirement of prompt disposition that was violated in this case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision and statutes involved	2
Statement	2
Summary of argument	8
Argument	13
I. The administrative remedy of remission and mitigation of forfeiture does not implicate any property interest and hence is not subject to the Due Process Clause	14
A. A government decision concerning conferral of a benefit does not involve a "property" interest unless the government is bound to take specified actions on the basis of particular findings	14
B. The remission and mitigation remedy is purely a matter of executive grace and therefore does not implicate the Due Process Clause	17
1. The statute establishing the remission and mitigation remedy does not create a property interest	17
2. Customs Service regulations concerning the processing of remission petitions do not create a property interest	20
II. Even if due process protections do attach to the remission process, the period of time taken to consider respondent's petition did not violate those constitutional protections	26
A. Due process protection for remission petitions does not include a right to a speedy disposition	26

Argument—Continued: Page

1. There is no need to create a constitutional right to a prompt disposition in order to ensure fundamental fairness in the remission context 26
2. Imposing constitutional time constraints on the consideration of remission petitions will adversely affect the interests of claimants in obtaining remission or mitigation 29

B. Even if a constitutional right to a speedy disposition of a remission petition does exist, the processing of respondent's petition did not violate that right 37

Conclusion 46

TABLE OF AUTHORITIES

Cases:

Armstrong v. *Manzo*, 380 U.S. 545 27
Barker v. *Wingo*, 407 U.S. 514 ..... *passim*
Barry v. *Barchi*, 443 U.S. 55 27
Bishop v. *Wood*, 426 U.S. 341 26
Board of Regents v. *Roth*, 408 U.S. 564 ..... 8, 15, 26, 34
Carey v. *Piphus*, 435 U.S. 247 31
Castleberry v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672 25
Cleveland Board of Education v. *Loudermill*, No. 83-1362 (Mar. 19, 1985) 15, 24, 27, 39
Connecticut Board of Pardons v. *Dumschat*, 452 U.S. 458 ..... 9, 16, 18, 21, 34
Goss v. *Lopez*, 419 U.S. 565 16
Greenholtz v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 ..... 14, 15, 16, 18, 20, 21, 26, 34
Heckler v. *Day*, No. 82-1371 (May 22, 1984) 26, 28, 36
Hewitt v. *Helms*, 459 U.S. 460 ..... 15, 20, 21, 22, 23, 25
INS v. *Miranda*, 459 U.S. 14 31
Ivers v. *United States*, 581 F.2d 1362 ..... 29, 36
Jago v. *Van Curen*, 454 U.S. 14 16
Johns v. *McKinley*, 753 F.2d 1195 ..... 34, 35
Lee v. *Thornton*, 538 F.2d 27 7

Cases—Continued: Page

Leis v. *Flynt*, 439 U.S. 438 17
Mackey v. *Montrym*, 443 U.S. 1 30
Mathews v. *Eldridge*, 424 U.S. 319 .....7, 27, 28, 30, 39
Meachum v. *Fano*, 427 U.S. 215 ..... 14, 16
Montanye v. *Haymes*, 427 U.S. 236 ..... 16, 21
Morrissey v. *Brewer*, 408 U.S. 471 .....16, 27, 36
Olim v. *Wakinekona*, 461 U.S. 238 .....16, 19, 21, 22, 25
Seguin v. *Eide*, 720 F.2d 1046, on remand from, 462 U.S. 1101, vacating and remanding 645 F.2d 804 35
Slocum v. *Mayberry*, 15 U.S. (2 Wheat.) 1 25
Smith v. *United States*, 360 U.S. 1 40
United States v. *Caceres*, 440 U.S. 741 23
United States v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 .....*passim*
United States v. *Elorduy*, 612 F.2d 986 39
United States v. *Lovasco*, 431 U.S. 783 .....11, 28, 37, 39, 40, 42
United States v. *MacDonald*, 456 U.S. 1 39
United States v. *Morris*, 23 U.S. (10 Wheat.) 246.. 18, 19
United States v. *Morrison*, 449 U.S. 361 30
United States v. *Nance*, 666 F.2d 353, cert. denied, 456 U.S. 918 39
United States v. *One 1961 Cadillac*, 337 F.2d 730.... 18
United States v. *One 1970 Buick Riviera*, 463 F.2d 1168, cert. denied, 409 U.S. 980 18
United States v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233 18
United States v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 18
United States v. *Stowell*, 133 U.S. 1 ..... 29, 34
United States v. *Struyf*, 701 F.2d 875 39
Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 15
Wolff v. *McDonnell*, 418 U.S. 539 ..... 15, 16

Constitution, statutes, regulations and rule:

U.S. Const. Amend. V 2, 14, 26
Due Process Clause .....*passim*
Speedy Trial Clause 37, 38, 39
Act of Mar. 3, 1977, ch. 13, 1 Stat. 506 *et seq.* 18

Statutes, regulations and rule—Continued: Page

Act of May 26, 1790, ch. 12, 1 Stat. 122 *et seq.* 18
Administrative Procedure Act, 5 U.S.C. 706(1) 25, 36
19 U.S.C. 1497 ..... 2, 5, 6, 13, 22
19 U.S.C. 1592 25
19 U.S.C. 1602 4
19 U.S.C. 1603 35
19 U.S.C. 1607 19
19 U.S.C. 1608 19
19 U.S.C. 1614 4
19 U.S.C. 1618 ..... 2, 5, 9, 17, 20
Pub. L. No. 98-573, Tit. II, 98 Stat. 2948 *et seq.*:
§ 213(a)(4), 98 Stat. 2984 19
§ 213(a)(5), 98 Stat. 2985 19
19 C.F.R.:
Section 162.43 4
Section 162.44(b) 4
Section 171.11(d) 25
Section 171.12(b) 40
Section 171.21 5
Section 171.24(a) 25
Section 171.33(b) 5, 25
Section 171, App. A 22
§ III.1 22
28 C.F.R.:
Section 9.1 *et seq.* 36
Section 9.3(g) 36
Fed. R. Crim. P. 41(e) 29, 41

Miscellaneous:

47 Fed. Reg. 7409 (1982) 21
48 Fed. Reg. 30098 (1983) 21, 22
50 Fed. Reg. 7335 (1985) 5
Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others under the Burger Court*, 59 N.Y.U.L. Rev. 482 (1984) .. 15
U.S. Customs Service, Dep't of the Treasury, *Fines, Penalties and Forfeitures Handbook* (rev. 1979) .. 24

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1144

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 729 F.2d 657. The previous opinion of the court of appeals (Pet. App. 15a-32a) is reported at 660 F.2d 1319.[1] The findings of fact and conclusions of law of the district court (Pet. App. 35a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1984. A petition for rehearing was denied on September 18, 1984 (Pet. App. 13a-14a). On December 6, 1984, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to January 15, 1985. The petition was filed on that date and was

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[1] That opinion as reported does not contain the modifications that the court of appeals made to its decision in denying the government's petition for rehearing. See Pet. App. 33a-34a.

granted on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

In March or April 1974, respondent, an automobile dealer, purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada

with the intention of bringing it into the United States (Tr. 13, 20-21). For this purpose, respondent had the automobile registered in the State of California and obtained California license plates for it (Pet. App. 36a). On January 20, 1975, respondent arrived in Vancouver to take possession of the vehicle and obtained a release form from Canadian customs authorizing him to transport it through Canada to the United States-Canadian border in British Columbia. Canadian customs officers instructed him to deliver the form to the Canadian customs border station before leaving Canada. Tr. 27-30, 151; Pet. App. 16a-17a, 36a.

Later that day, respondent drove south toward the United States border. After failing to stop first at the Canadian customs station to surrender the release form as he had been instructed, he arrived at the United States border checkpoint at Blaine, Washington at approximately 5:00 p.m. Tr. 31-32; Pet. App. 17a, 36a-37a.[2]

Earlier that day Canadian customs officials had alerted United States customs officers at the Blaine checkpoint that a Jaguar Panther automobile had been off-loaded at the Vancouver ocean terminal and might be driven across the border into the United States (Tr. 110-111). As respondent drove up to the Customs primary inspection point, the inspector on duty recognized that the automobile matched the description given by the Canadians. After the inspector inquired whether respondent was a United States citizen and how long he had been outside the United States, he asked whether respondent had "purchas[ed] or acquir[ed] anything outside the United States" (Tr. 113). When respondent answered negatively, the inspector asked him whether he had anything to declare to Customs, "to make sure there was no mistake about what information was needed" (Tr. 114). Respondent indicated that the only property in his pos-

[2] Respondent testified that he inadvertently passed the Canadian customs building because of poor visibility and inadequate directions (Tr. 31-32; Pet. App. 17a).

session was his personal belongings (*ibid.*). Pet. App. 17a, 37a.[3]

Following this exchange, the inspector directed respondent to park his car and to enter the Customs station. He then referred the case to his supervisor, giving as the reason for additional inquiry respondent's failure to declare the vehicle (Tr. 115-116). When the supervisory inspector asked respondent why he had failed to declare his automobile, respondent answered that he did not think he was required to. The officer then informed him that the vehicle was being seized because of his failure to declare it. Tr. 144-145, 148-149; Pet. App. 17a-18a. See 19 U.S.C. 1497, 1602.

The supervisor then completed the necessary seizure documents and assisted respondent in preparing a "Petition for Remission or Mitigation of Forfeitures and Penalties Incurred." In his very brief, handwritten petition, respondent stated that he "had no intention of avoiding U.S. Customs duties" and explained that he had mistakenly arrived at the United States Customs office after attempting to locate Canadian customs for the purpose of surrendering his Canadian release form (J.A. 12; Pet. App. 18a). Upon completion of the necessary documents, the supervisor explained that respondent could obtain the release of his vehicle by posting a cash bond[4] and arranged for respondent to be transported to a local hotel (Tr. 51, 155-159). From there, respondent arranged to fly home in his private plane that was waiting in Seattle (Tr. 51-52).

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[3] During the hearing, respondent conceded that he knew he had to declare his automobile at the United States Customs station. He claimed, however, that he understood the Customs inspector's questions to relate exclusively to purchases or acquisitions made in Canada and that the inquiry thus did not refer to his automobile, since it had been purchased in Switzerland (Tr. 38-40).

[4] Customs officials have discretion to release a seized vehicle to a person claiming a "substantial interest therein" upon payment of the value of the vehicle. 19 U.S.C. 1614. The payment serves as a bond to cover any penalty assessed for failure to make the declaration required by law. See 19 C.F.R. 162.43, 162.44(b).

2. Two weeks later, on February 3, 1975, respondent posted a bond for $24,500, the appraised value of his car, and Customs returned the vehicle to him (Pet. App. 19a). On February 12, 1975, respondent filed with Customs a "Supplement to the Petition for Remission" in which he provided a detailed account of the circumstances surrounding his attempt to bring the automobile into this country. Respondent alleged for the first time that the Customs inspector had never inquired whether respondent had anything to declare; he also repeated his earlier claim that he fully intended to pay the duty on the automobile. J.A. 13-16. The filing contained no request that his petition be acted upon with expedition.

On February 25, 1975, the Seattle District Director of the Customs Service[5] informed respondent that, upon consideration of his petition and the reported facts, the penalty for failing to declare the car, in violation of 19 U.S.C. 1497, was being remitted to $3,600. The District Director therefore refunded $20,900 to respondent (J.A. 17). Respondent objected (J.A. 18-19) and obtained an administrative review of this determination (see 19 C.F.R. 171.33(b)), and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment (J.A. 20). Pet. App. 19a.

2. Respondent then filed the instant suit in the United States District Court for the Central District of California, seeking return of the $3,600 penalty and a declaration that the seizure of his automobile and the imposition of a penalty were unlawful. Respondent also sought injunctive relief ordering that his name be withdrawn or

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[5] By statute, the Secretary of the Treasury is authorized to act on petitions for remission or mitigation. 19 U.S.C. 1618. This authority has been delegated to District Directors of the Customs Service in cases where the total value of the merchandise forfeited does not exceed $25,000 (19 C.F.R. 171.21), and that amount was recently raised to $100,000 for some cases (50 Fed. Reg. 7335 (1985)). The estimated value of respondent's car, $24,500, thus fell within the District Director's authority to act on petitions for remission or mitigation.

deleted from any Customs Service computer or list of individuals who have attempted to violate the customs laws. C.A. App. 2-9.[6] After an evidentiary hearing, the district court found that respondent had violated 19 U.S.C. 1497 by failing to declare his automobile and that, accordingly, the seizure of the vehicle by Customs was proper and the automobile was subject to forfeiture (Pet. App. 39a). The district court also found that the remission and mitigation procedures followed by Customs "were proper" (*ibid.*).

3. The court of appeals affirmed the district court's determination that the seizure of respondent's vehicle was proper, finding that "[t]he record fully supports the district court's conclusion that [respondent] attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so." Pet. App. 20a. It reversed, however, the district court's holding that the procedures followed by Customs in acting upon respondent's petition for mitigation were proper. Proceeding from the premise that in cases involving the seizure of an automobile "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618" (Pet. App. 30a), it held that "[t]he [one month] delay in processing [respondent's] petition for remission or mitigation

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[6] "C.A. App." refers to the excerpt of record filed with the court of appeals. In its answer, in addition to defending the lawfulness of its action, the government asserted that the remission and mitigation sought and received by respondent was "a final settlement, accord and satisfaction" binding on him (C.A. App. 22). In addition, the government filed a contingent counterclaim seeking recovery of the full $24,500, in accordance with 19 U.S.C. 1497, in the event the district court found the administrative mitigation proceedings invalid. The counterclaim was based upon the theory that, if the administrative settlement were found to be invalid, the government was free to seek forfeiture of the full value of the vehicle as a penalty for failure to declare it, just as if no administrative relief had ever been granted (C.A. App. 22-23, 32). The district court entered a judgment in favor of the government on the merits and accordingly denied the contingent counterclaim and found it unnecessary to reach the settlement question (Pet. App. 39a).

* * * violated his due process right to prompt consideration of his claim" (*id.* at 32a).[7] The court then went on to articulate specific standards to be used by Customs prospectively to assure the prompt processing of petitions for administrative relief. The court stated that Customs should, unless "unusual circumstances" require a brief delay, act on all petitions within 24 hours of receipt and provide the claimant an opportunity to make an oral appearance to argue his claim (*id.* at 31a-32a & n.16, 33a-34a).

4. The government sought certiorari, and this Court granted the petition and vacated and remanded for reconsideration in light of *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983). 462 U.S. 1101 (1983). On remand, the court of appeals adhered in substantial part to its previous decision (Pet. App. 1a-12a). The court found that this Court's decision in *$8,850* "reinforce[d]" its view that due process rights attach to the processing of the petition for remission, and therefore the court reaffirmed its earlier view that due process requires Customs to dispose of those petitions promptly (*id.* at 7a).

With respect to the standards it had established for considering petitions for remission or mitigation, the court of appeals drew back from the 24-hour limit that it had imposed, noting that *$8,850* had indicated that a due process inquiry should be a flexible one that depends on the facts of a particular case (Pet. App. 8a). Relying

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[7] The court of appeals relied heavily upon the decision of the Second Circuit in *Lee* v. *Thornton*, 538 F.2d 27 (1976), in concluding that due process requires prompt disposition by Customs of administrative petitions for remission or mitigation of vehicle forfeitures. In *Lee*, the court, relying upon the balancing analysis in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that when vehicles are seized as security for a penalty or for forfeiture, action on petitions for remission or mitigation should be required within 24 hours, unless a hearing on probable cause is requested by the claimant, in which event the hearing should be conducted within 72 hours of the seizure. 538 F.2d at 33.

on *$8,850*, the court adopted the four-factor analysis of *Barker* v. *Wingo*, 407 U.S. 514 (1972), as the appropriate framework for considering a claim of violation of due process through delay in processing a petition for remission or mitigation (Pet. App. 8a-9a & n.6).

The court of appeals remanded the case to the district court to consider those factors, but it deemed it appropriate to make several observations to assist the district court. Stating that "the propriety of the delay may turn to a great extent upon the nature of the item that has been seized," the court of appeals noted the "special hardships" imposed on persons deprived of their automobiles, which are "particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point" (Pet. App. 10a). Although the reasons for the delay were not previously at issue in the district court, the court of appeals also stated that the record indicated "no obvious reason" for the one-month delay and that it "appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition" (*id.* at 11a). With respect to the third *Barker* factor, the court noted that respondent had promptly filed a petition for remission, "which seems a sufficient assertion of his rights" (*ibid.*). Finally, the court noted that the prejudice to the claimant from the delay could include "expenses resulting from a seizure of his vehicle, sudden disruption of travel plans [and] inconvenience" (*id.* at 12a).

SUMMARY OF ARGUMENT

I.

It is well established that the protections of the Due Process Clause do not extend to every government decision that affects individual interests. By its terms, the Clause applies only to deprivations of "life, liberty, or property." "Property" interests are not created by the Constitution; they are created by the state through the conferral of rights by law. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Numerous decisions of this Court have made clear that only when the government

binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts does it establish a "property" or "liberty" interest covered by the Due Process Clause. Thus, for example, the Court has held that an inmate may not challenge on due process grounds the failure of the Connecticut Board of Pardons to commute his life sentence even though 75% of all commutation requests were granted by the Board. *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981). Because the Board's decision was committed wholly to its discretion, the inmate's petition was "nothing more than an appeal for clemency" (*id.* at 465) that could generate no due process protection regardless of the frequency with which relief was granted.

Like the commutation remedy in *Dumschat*, the relief of remission or mitigation of forfeiture is purely a matter of executive grace that does not implicate due process protections. The statute creating the remedy provides that the Secretary of the Treasury "may" remit or mitigate the forfeiture and establishes no limitation on the Secretary's exercise of that discretion. 19 U.S.C. 1618. The claimant therefore has no entitlement to relief on any particular set of facts, and the Secretary's decision to deny relief in a given case is unreviewable. Hence, the remission procedure does not create a "property" interest.

By the same token, internal Customs Service guidelines concerning the disposition of remission petitions do not create an entitlement to relief that invokes due process protection. These guidelines, which were not even made available to the public until several years after respondent's remission petition was acted upon, expressly "are not mandatory"; their purpose is to promote equitable and uniform results among the various decisionmakers within the agency, not to confer on a claimant any right to a particular disposition. To construe these guidelines as creating a constitutionally protected property interest, contrary to the agency's intent, would be counterproductive because it would simply encourage the agency to eliminate the guidelines.

The conclusion that there is no independent property interest in the remission proceeding does not mean that an individual's property can be seized and forfeited without due process. The Due Process Clause applies to the deprivation of the claimant's ownership interest in the seized property, and therefore he has a right to a hearing on the question of forfeitability. But the basic premise underlying the remission petition is the assumed forfeitability of the property, which extinguishes the claimant's ownership interest, and therefore there is no independent property interest in the remission proceeding to which due process rights can attach. Of course, Congress and the agency ordinarily can be expected to establish fair procedures for decisionmaking, which is in fact precisely what has happened in the remission context. In the absence of a property interest, however, these procedures are not constitutionally compelled.

II.

A. Even if due process protections do apply to the remission procedure, those protections should not include a right to a speedy disposition. Due process basically guarantees that a proceeding be fair; the exact contours of the protections vary according to the demands of the situation. A right to a speedy disposition is not ordinarily considered one of the basic due process protections, and it is particularly inappropriate in the remission context. Because it is a given of the remission proceeding (as distinct from the forfeiture proceeding) that the property is forfeitable (and forfeited property becomes owned by the government as of the time it is seized), delay in processing a remission petition does not deprive the claimant of the use of *his* property. The property belongs to the government, which may decide—in its discretion—to remit all or part of its value to the claimant. Therefore, the right to speedy action found necessary by the Court with respect to the institution of judicial forfeiture proceedings (see *$8,850*, 461 U.S. at 563-565), where the ownership of the property is in dispute, is inappropriate in the remission context.

In fact, a constitutional right to prompt disposition of a remission petition would have the perverse effect of undermining the primary goal of the Due Process Clause —promoting fair and reasoned decisionmaking. Adequate consideration of the merits of a remission petition may entail time-consuming investigation of relevant facts; in addition, to assure equitable results the Customs Service has established review procedures, which also require time. Moreover, the sheer number of remission petitions processed (more than 50,000 each year) makes it impossible for Customs to give each one proper attention in the short time frame contemplated by the court of appeals.

The decision below, however, elevates speed above all other considerations in the processing of remission petitions. Because the agency cannot predict with any confidence whether a court will ultimately find a particular decisional time frame to be too long, the decision below places tremendous pressure on Customs to dispose of petitions as quickly as possible. In this context, where the decision is committed to the agency's unfettered discretion and is unreviewable, the logical response for Customs would be simply to deny all petitions that it cannot definitely determine to grant in very short order. The ultimate result would be that many cases that are now settled administratively would instead be referred for judicial forfeiture proceedings. This would place added burdens on the government and the courts; even more important, it would seriously disadvantage claimants, for most of whom the remission process is their only realistic hope of reacquiring any of their property.

B. Even assuming that there exists a constitutional right to speedy disposition of a remission petition, that right could not possibly have been violated in this case. First, respondent has not alleged that he was prejudiced by the delay in his ability to secure relief from forfeiture; however, prejudice is ordinarily a necessary element of a due process claim. *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). The court of appeals therefore erred in applying the four-factor test of *Barker* v.

Wingo, 407 U.S. 514 (1972), as if this were a claim under the Speedy Trial Clause.

In any event, proper application of the *Barker* factors establishes that no constitutional violation occurred here. Under *Barker*, only a delay that is so long as to be "presumptively prejudicial" triggers consideration of the other factors (407 U.S. at 530). In the speedy trial context, which involves a serious loss of liberty, delays of less than seven months generally are considered too short to warrant triggering more detailed inquiry; in the due process context, the Court has recognized that even longer delays are not presumptively prejudicial. The 36-day delay here does not even approach the level at which a serious question of unconstitutional delay requiring resort to the full *Barker* analysis might be presented.

Finally, the focus of the court of appeals' *Barker* analysis is completely misdirected. The court looked at the prejudice resulting from the *seizure* itself, not that resulting from the delay in processing the remission petition, which is the alleged constitutional violation. The fact that respondent was inconvenienced by having the car seized at the border and was deprived of its use for a few days before he posted a bond (see Pet. App. 12a) was a direct result of his actions in attempting to bring his car across the border without declaring it, thus making the car subject to seizure and forfeiture. This inconvenience and deprivation was not a product of any delay in acting on the remission petition. Unless the remission decision is made sooner than the claimant is likely to be able to procure substitute transportation, which is plainly not practical, it cannot possibly alleviate any of the "prejudice" relied on by the court of appeals, and hence that prejudice is quite irrelevant here.

In sum, proper application of the *Barker* factors manifestly requires denial of respondent's claim. The delay was quite short. It seems likely that it was justified by the need to investigate and assess the merits of respondent's remission petition. Respondent did not assert his desire for a speedy disposition of the petition; indeed, his

filing of a detailed supplement plainly belies such an intent. And there is no suggestion how the delay in acting on the petition could possibly have prejudiced respondent in his ability ultimately to receive a favorable resolution (see *$8,850*, 461 U.S. at 569-570) or in any other way.

ARGUMENT

Respondent was discovered by Customs officials attempting to bring a $24,500 foreign automobile into the United States without declaring it. It is undisputed that those officials were authorized to seize the automobile because of this violation of 19 U.S.C. 1497 and that the automobile was forfeitable to the United States. See Pet. App. 4a n.3, 20a-22a, 37a, 39a. Pursuant to its discretionary authority conferred by statute, however, the Customs Service granted respondent substantial relief on his petition for remission or mitigation, agreeing to mitigate the severity of the forfeiture and remit $20,900 to respondent, thus imposing a modest penalty of $3,600 for the statutory violation. The court of appeals has nevertheless held that the Constitution may relieve respondent entirely of liability for his misdeed—even the greatly mitigated penalty imposed by Customs. The court concluded that the time taken to rule on respondent's petition for remission and mitigation—36 days from the filing of the petition and 13 days after respondent filed an extensive supplement—violated the Due Process Clause in the absence of a particularized justification for the delay. The result is that he may be excused from the mitigated penalty and, indeed, even the payment of customs duty on the automobile.

The court of appeals' decision is erroneous in several respects. First, because the remission and mitigation remedy is purely one of administrative grace, its existence does not give rise to a property interest to which the protections of the Due Process Clause attach. An individual's ownership interest in property, of course, provides him with a constitutional guarantee that the property will not be seized or forfeited without due process. This constitutional protection, however, does not

extend to the procedures for mitigation, under which the government may elect to forgo the full forfeiture to which it is entitled and allow an individual to retain some portion of the value of the forfeited property. Second, even if the Constitution does extend due process protection to the mitigation decision, it does not require a speedy disposition. Finally, even if the Due Process Clause protects against undue delay in disposition of remission petitions, the action on respondent's petition was swift enough to satisfy any conceivable requirement of prompt disposition that the Constitution might impose.

I. THE ADMINISTRATIVE REMEDY OF REMISSION AND MITIGATION OF FORFEITURE DOES NOT IMPLICATE ANY PROPERTY INTEREST AND HENCE IS NOT SUBJECT TO THE DUE PROCESS CLAUSE

A. A Government Decision Concerning Conferral Of A Benefit Does Not Involve A "Property" Interest Unless The Government Is Bound To Take Specified Actions On The Basis Of Particular Findings

The Fifth Amendment provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." While the procedural protections conferred by this clause are broad-ranging, it is well established that they do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group:

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations.

Greenholtz v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979), citing *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976). By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a person of "life,"

"liberty," or "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972). The government's discretionary decision whether to mitigate a forfeiture cannot result in a deprivation of "property," and hence the requirements of the Due Process Clause have no application here.

It is axiomatic that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state [or federal] law.'" *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 5 (quoting *Board of Regents* v. *Roth*, 408 U.S. at 577). See also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980). In various contexts, this Court has repeatedly faced the question whether a particular government program creates a property or liberty interest cognizable under the Fifth Amendment. From these cases, the clear rule has emerged that only when the government binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts does a "property" or "liberty" interest exist that receives the protection of the Due Process Clause.[8]

In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), for example, the Court held that the state government had created a liberty interest in the provision of good-time credits to prisoners (resulting in earlier release) and therefore that a decision to deprive a prisoner of his

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[8] While there has been considerable disagreement on the Court as to the extent to which *liberty* interests exist as inherent basic freedoms independent of any specific statutes or regulations (see, *e.g.*, *Hewitt* v. *Helms*, 459 U.S. 460, 481-488 (1983) (Stevens, J., dissenting); *Greenholtz*, 442 U.S. at 18-20 (opinion of Powell, J.)), it has never been disputed that *property* interests flow solely from positive law. Even commentators critical of the Court's approach to cases involving "liberty" claims concede that "property" is much more appropriately defined solely as the creation of the state. See Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others under the Burger Court*, 59 N.Y.U. L. Rev. 482, 529-530 (1984).

good-time credits was subject to the constraints of the Due Process Clause. The basis for the "liberty interest" was that the state statute conferred a right to good-time credits and specified that the right could be "forfeited only for serious misbehavior" (418 U.S. at 557), thus creating a statutory entitlement to the credits unless a factual finding of serious misbehavior was made.[9] By contrast, in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), the Court held that due process rights did not attach to the decision to transfer a state prisoner to another facility. The crucial distinction from *Wolff* was that these transfers "are not conditioned upon the occurrence of specified events" (*Meachum*, 427 U.S. at 226-227 (footnote omitted)); rather, "prison officials have discretion to transfer [an inmate] for whatever reason or for no reason at all" (*id.* at 228). The Court concluded that "no Due Process liberty interest of a duly convicted prison inmate is infringed when he is transferred * * * absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events" (*Montanye*, 427 U.S. at 242). See also *Olim* v. *Wakinekona*, 461 U.S. 238, 248-251 (1983); *Jago* v. *Van Curen*, 454 U.S. 14, 20-21 (1981); *Greenholtz*, 442 U.S. at 10.

In *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S 458 (1981), the Court applied this analysis in a situation closely analogous to the remission context. Under Connecticut law, the Board of Pardons is empowered to commute life sentences by reducing the minimum prison term, thereby accelerating eligibility for parole. An inmate whose request for commutation had been rejected brought suit alleging that the Board's procedures did not comport with due process; to support his claim that the Board's decision infringed a "liberty" interest,

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[9] See also *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (statutory right to remain free on parole unless specific terms violated); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (right to attend public school unless guilty of misconduct).

the inmate asserted that he had a reasonable expectancy that his sentence would be commuted because 75% of all commutation requests were granted by the Board.

The Court, however, unequivocally rejected the contention that the Board's decision implicated a liberty interest protected by the Due Process Clause. The Court explained that there were "no explicit standards" for the commutation decision (452 U.S. at 466), *i.e.*, the Board was "not required to act on prescribed grounds" (*id.* at 467); rather, the Board of Pardons was invested with "'unfettered discretion'" (*id.* at 466). Therefore, the Court concluded that the petition for commutation "in each case is nothing more than an appeal for clemency * * *; it is simply a unilateral hope" to which due process protections do not attach (*id.* at 465). The Court particularly emphasized that "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; * * *. The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency" (*ibid.*). See also *id.* at 467 (Brennan, J., concurring); *Leis* v. *Flynt*, 439 U.S. 438, 444 n.5 (1979).

B. The Remission And Mitigation Remedy Is Purely A Matter Of Executive Grace And Therefore Does Not Implicate The Due Process Clause

1. *The statute establishing the remission and mitigation remedy does not create a property interest*

The statutory source of authority to remit or mitigate Customs forfeitures is 19 U.S.C. 1618, which provides that the Secretary of the Treasury "*may* remit or mitigate the [forfeiture] upon such terms and conditions as he deems reasonable and just" (emphasis added) if he finds a lack of culpable intent or "the existence of such mitigating circumstances as to justify" a reduction or elimination of penalty. The permissive language of the statute makes clear that the remedy is completely at the discretion of the Secretary, who may refuse relief to a petitioner who acted without culpable intent or may

grant it to one who acted with intent to defraud, if the Secretary finds "such mitigating circumstances" as support relief. In short, no set of facts that respondent could have demonstrated would have entitled him to any relief from the Secretary, because nothing in the statute requires the Secretary to grant mitigation under any particular set of circumstances.[10] Indeed, over 150 years ago, this Court described the Customs remission process as a "subject submitted to [the Secretary's] sound discretion." *United States* v. *Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825).[11]

The mitigation statute therefore is just like the sentence commutation statute involved in *Dumschat*. It gives the claimant no more than the ability to "appeal for clemency" (452 U.S. at 465); the disposition of that appeal is committed to the unfettered discretion of the Secretary of the Treasury or his delegate. Not only has Congress failed to impose any criteria that bind the Secretary, it has not provided any mechanism at all for review of his decision. It is undisputed that the courts lack jurisdiction to review the Secretary's action on a petition for remission or mitigation. See *United States* v. *Morris*, 23 U.S. (10 Wheat.) at 285; *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *United States* v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States* v. *One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), cert. denied, 409 U.S. 980 (1972); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964). In sum,

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[10] By contrast, in *Greenholtz* the Court found that the mandatory language of the statute—specifying that the Board of Parole "shall" order release unless certain specified conditions were met—created an entitlement to release that invoked due process protections. 442 U.S. at 11-12. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. at 466-467.

[11] The statute under consideration in *Morris* was couched in language quite similar to the present statute. See 23 U.S. (10 Wheat.) at 285, 291-292; Act of Mar. 3, 1797, ch. 13, 1 Stat. 506 *et seq.* See also Act of May 26, 1790, ch. 12, 1 Stat. 122 *et seq.* (original remission statute).

this unreviewable, purely discretionary, administrative determination whether to mitigate a lawful forfeiture is purely a matter of executive grace. Because the claimant has no entitlement to relief in any situation, there can be no deprivation of property and hence the protections of due process are not implicated. See *Olim* v. *Wakinekona*, 461 U.S. at 250.

It must be emphasized that the question of the applicability of the Due Process Clause to the remission decision is quite distinct from the question of the procedures required in connection with the *forfeiture* of the seized property. Plainly, respondent had a property interest in his automobile at the time it was seized. The Constitution guarantees that he cannot be deprived of that property interest without due process of law, and he is entitled to a full-fledged judicial hearing before his property is declared forfeited. See generally *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983).[12] Indeed, under *$8,850*, respondent or any claimant has due process protection against unreasonable delay in the forfeiture proceeding.

But that basic property interest in the automobile has nothing to do with the remission decision. The remission proceeding "presupposes that the offence has been committed" (*United States* v. *Morris*, 23 U.S. (10 Wheat.) at 291), *i.e.*, it is premised on the assumption that the property is indeed forfeitable. The only question is whether the Secretary will choose to remit to the claimant all or part of the value of the forfeited property.[13]

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[12] Certain classes of forfeitable property are subject to administrative (or summary) forfeiture. The claimant has the option, however, of contesting forfeiture of such property in a judicial proceeding if he posts a bond to cover the costs. 19 U.S.C. 1607, 1608, as amended by Pub. L. No. 98-573, Tit. II, § 213(a)(4) and (5), 98 Stat. 2984-2985.

[13] Obviously, if the seized property is not forfeitable it cannot be forfeited, and the claimant has no need for the remission proceeding.

Therefore, the claimant's property interest in the seized property is not implicated in the remission proceeding. That interest is completely extinguished by the forfeitability of the property. This point is perhaps best illustrated by examining the hypothetical situation presented if Customs procedures provided that the remission petition must be filed *after* the judicial forfeiture proceeding. The claimant would have the same interest in getting a speedy decision in that situation as he does here; conceptually, the two situations are not different. But it is clear that his prior ownership would give him no property interest in the outcome of the remission proceeding. Thus, the only due process question involved here is whether the existence or structure of the remission proceeding creates an independent property interest that implicates constitutional protections. See *Greenholtz*, 442 U.S. at 7 (basic liberty interest in avoiding confinement extinguished by conviction; liberty interest in parole must derive from different source).[14]

2. *Customs Service regulations concerning the processing of remission petitions do not create a property interest*

As discussed above, it is clear that Congress did not establish any entitlement to relief when it conferred by statute upon the Secretary of the Treasury the discretionary authority to grant remission. This Court has held, however, that such an entitlement, even if not required by statute, also may be created by administrative regulations that impose mandatory criteria for particular determinations. *Hewitt* v. *Helms*, 459 U.S. 460 (1983).

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[14] It cannot seriously be contended that the Constitution requires that remission or mitigation relief be available. The forfeiture statute would be valid even if the remission remedy of 19 U.S.C. 1618 were repealed, in which case respondent would have forfeited the full value of his automobile. If respondent's property interest in his automobile is not sufficient to require even the existence of a remission procedure, it follows *a fortiori* that it cannot alone operate to require particular procedural protections once Congress has elected to mitigate the harshness of the forfeiture statute by providing such a remedy.

In *Hewitt*, the Court held that the Pennsylvania prison regulations governing administrative segregation of prisoners created a liberty interest because of their "repeated use of explicitly mandatory language in connection with requiring specific substantive predicates" for the decision. 459 U.S. at 472. The guidelines established by the Customs Service for ruling on remission petitions, however, plainly do not create any property interest that invokes due process protections.

When respondent filed his petition for remission, there were no regulations governing the disposition of his request, but there were internal guidelines within the Customs Service that sought to promote uniform decisionmaking. See generally 48 Fed. Reg. 30098 (1983); 47 Fed. Reg. 7409 (1982). Purely internal guidelines such as these, however, cannot give rise to a constitutionally protected property interest. First, because the guidelines are not public or otherwise known to the claimant, they cannot provide him with any expectation of relief on a given set of facts. Regardless of the facts of his particular situation, he still has no more than a "unilateral hope" (*Dumschat*, 452 U.S. at 465) of obtaining mitigation of the forfeiture. See also *Greenholtz*, 442 U.S. at 11-12; *Montanye* v. *Haymes*, 427 U.S. at 242. Moreover, while such internal guidelines plainly are intended to guide the determinations of persons to whom duties have been delegated, they cannot bind the statutorily-designated decisionmaker himself. Since they are not even distributed outside the agency, internal guidelines exist and are applied solely at the discretion of the head of the agency who promulgated them. Thus, in this case, regardless of the degree of discretion conferred by the internal guidelines that were in use, the discretion of the Secretary of the Treasury to rule on remission petitions remained unfettered, as provided by statute. Accordingly, the guidelines could not confer upon respondent any entitlement to relief. See *Olim* v. *Wakinekona*, 461 U.S. at 249-250.

Subsequent to the events involved in this case, the Customs Service extensively revised its guidelines for

ruling on remission petitions filed in connection with violations of 19 U.S.C. 1497, and it has now made the revised guidelines available to the public. 48 Fed. Reg. 30098 (1983); 19 C.F.R. 171, App. A. The guidelines identify certain mitigating and aggravating factors to be taken into account and establish a range of appropriate remission decisions depending on the presence or absence of these factors. Even these guidelines, however, do not create a property interest because they do not bind the government to take any specific action on a remission petition. By their terms, the guidelines "provide a framework and procedure by which violations of 19 U.S.C. 1497 are to be analyzed. They are not mandatory in the sense that they must be absolutely applied" (§ III.1.). Rather, they allow the decisionmaker to retain discretion to depart from the guidelines for reasons that he deems appropriate. Thus, in contrast to *Hewitt* where the relevant regulations "used language of an unmistakably mandatory character" (459 U.S. at 471) and left no room for the use of administrative segregation in the absence of specific substantive predicates, the regulations here explicitly state that they are not mandatory. See also *Olim* v. *Wakinekona*, 461 U.S. at 250 n.10. The intent of the Customs guidelines plainly is to promote fair and uniform dispositions among the various persons who rule on remission petitions, not to establish a right of the claimant to any particular disposition.

As a general rule, the courts should be extremely hesitant to infer the creation of a property interest from regulations promulgated by an agency in furtherance of its duty to exercise discretionary authority conferred by statute. Even where official action is intrinsically subjective, judgmental, or discretionary, it is ordinarily sound governmental practice to attempt to achieve rationality and consistency of action through the use of written guidelines.[15] This Court has characterized the channel-

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[15] By the same token, publication of such guidelines may in some circumstances be beneficial to both the government and the public. In this case, for example, the publication by the Customs Service of

ling of decisionmaking in this manner as a "salutary development." *Hewitt* v. *Helms*, 459 U.S. at 471. But, as noted above, the establishment of such guidelines does not necessarily evidence a decision to guarantee particular action on any particular set of facts and thereby to create a property interest. If the promulgation of guidelines is deemed, contrary to the agency's intent, to embrace the full panoply of constitutional due process protections, the unfortunate result may be to discourage the government from issuing such guidelines altogether. See *ibid.*; *United States* v. *Caceres*, 440 U.S. 741, 755-756 & n. 24 (1979).

In this case, for example, if the guidelines issued by the Customs Service were deemed to create a property interest, which in turn imposed upon the agency a requirement of speedy disposition of remission petitions that it considered unduly burdensome, a logical response for the agency would be to eliminate the guidelines and return to a regime of less consistent decisionmaking.[16] Thus, in considering whether agency regulations themselves create a property interest, the touchstone of the inquiry should be the agency's intent in promulgating those regulations; imposing procedural requirements contrary to that intent is unwarranted and likely to be counterproductive.[17] Here, the guidelines themselves

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the factors that it considers relevant in exercising the Secretary of the Treasury's discretionary authority to rule on remission petitions will help ensure that claimants address those factors in their remission petitions and therefore draft the petitions in the manner that is most useful to the Customs Service and to the claimants themselves.

[16] The costs to the agency of maintaining the guidelines would go well beyond the administrative burdens imposed by additional due process protection. The possibility that agency action on remission petitions would be found to violate the Constitution raises the dual dangers that, as here, a valid forfeiture will be nullified and that individuals may be subject to *Bivens* suits (see note 27, *infra*).

[17] The question whether government action creates a property interest is distinct from the question of what process is due once

make it crystal clear that they were not intended to create any due process rights.

The conclusion that a claimant lacks a property interest in the disposition of his remission petition and hence that the Due Process Clause is not implicated does not mean that arbitrary decisionmaking will be unduly encouraged. On the contrary, quite apart from constitutional constraints and judicial oversight, both legislature and executive have an independent interest in providing a fair and efficient decisional process. With respect to petitions for remission, the Customs Service has established a multi-step investigation and review process [18] that provides that the final decision be reflected in

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a property interest has been created. If an individual has a property right, he may not be deprived of that property without due process, *as guaranteed by the Constitution.* The government does not have the power to create a property interest and condition it upon submission to constitutionally inadequate procedures. See *Cleveland Board of Education* v. *Loudermill,* slip op. 6-8. Thus, the question whether a property interest exists turns largely on the intent of the government; the question of what process is due for the deprivation of a property interest is a constitutional one to which the intent of the government appears to be largely irrelevant.

[18] The procedures for processing petitions for remission of forfeiture, which are set forth in the U.S. Customs Service, Dep't of the Treasury, *Fines, Penalties and Forfeitures Handbook* 116-119 (rev. 1979), provide that: (1) upon receipt of a petition, an "FP&F" officer examines the document to determine whether further investigation is needed; (2) if he determines that further investigation is required, he prepares a request for investigation and forwards it to the district director; if additional investigation is not deemed necessary, he prepares a memorandum for the district director recommending a final determination based upon guidelines and applicable precedent; (3) in cases where further investigation is deemed necessary, the district director may refer the case to the Customs Office of Investigation, which will further investigate the allegations contained in the petition or obtain the information specified by the district director; (4) following the investigation, the customs investigator files a report with the district director; (5) upon completion of the investigatory and review processes, the district director decides the action to be taken on the petition and advises the petitioner of the decision in a written opinion that includes a statement of the findings of fact and the reasoning on

a written opinion that includes a statement of findings of fact and reasons.[19] Indeed, respondent has never suggested that he was denied a fair adjudication or that he did not receive due process, apart from the question of speedy disposition.[20]

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which the decision relies. A disappointed petitioner may, as respondent did, obtain administrative review from the Regional Commissioner. 19 C.F.R. 171.33(b). For seizures valued at more than $25,000, there is an additional level of review; the final decision on the petition is made by Customs' Washington, D.C. headquarters or, if the seized items are valued at more than $100,000, by the Department of Treasury (Pet. App. 48a-49a).

It is clear, of course, that the institution of particular *procedures* by an agency does not itself operate to create a property interest. *Olim* v. *Wakinekona*, 461 U.S. at 250-251; *Hewitt* v. *Helms*, 459 U.S. at 471.

[19] The specific requirement that the written opinion contain findings of fact and a statement of reasons was established in 1978 to conform Customs practice generally with the new requirements imposed by amended 19 U.S.C. 1592. Thus, this requirement was not in force at the time respondent filed his petition.

[20] The internal Customs procedures for processing remission petitions do not establish any specific time frames for decision-making. A claimant is not powerless, however, to obtain a speedy resolution of the question of his interest in the property. If delay in processing the administrative petition for remission or mitigation is unreasonable under the Administrative Procedure Act, the claimant may file suit to attempt to compel the agency to act. 5 U.S.C. 706(1); see note 30, *infra*. If the delay is not "unreasonable" under the statute, but has become inconvenient for the claimant, he may, of course, seek prompt judicial forfeiture proceedings. See *$8,850*, 461 U.S. at 569; *Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817); *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672, 674-675 (5th Cir. 1976). Indeed, Customs regulations now provide that cases "will be referred promptly to the United States Attorney for institution of judicial proceedings" "unless the petitioner provides an express agreement to defer judicial or administrative forfeiture proceedings until completion of the administrative process." 19 C.F.R. 171.11(d). The referral of the case to the Department of Justice for the institution of a forfeiture action will result in the forwarding of the petition for remission to the Department of Justice for decision as well. 19 C.F.R. 171.24(a). In any

The Constitution simply was not designed to oversee every aspect of governmental decisionmaking. See *Greenholtz*, 442 U.S. at 7; *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976). When Congress enacts a procedure that creates no entitlement, but rather operates solely as a matter of administrative grace, an individual's procedural protections are established not by the Constitution but by the political processes as reflected in the procedures accorded by Congress itself or by the agency. Cf. *Heckler* v. *Day*, No. 82-1371 (May 22, 1984) (noting congressional consideration of wisdom of imposing deadlines on disability benefit eligibility determinations); *Board of Regents* v. *Roth*, 408 U.S. at 578-579 (noting that opportunity for hearing in connection with employment nonretention may be appropriate even though not constitutionally required).[21]

II. EVEN IF DUE PROCESS PROTECTIONS DO ATTACH TO THE REMISSION PROCESS, THE PERIOD OF TIME TAKEN TO CONSIDER RESPONDENT'S PETITION DID NOT VIOLATE THOSE CONSTITUTIONAL PROTECTIONS

A. Due Process Protection For Remission Petitions Does Not Include A Right To A Speedy Disposition

1. *There is no need to create a constitutional right to a prompt disposition in order to ensure fundamental fairness in the remission context*

Even assuming that the existence and structure of the remission procedure is deemed to create a property interest, it does not necessarily follow that due process requires a speedy disposition. A conclusion that Fifth Amendment protections apply to the consideration of a

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event, the claimant retains the right to raise a due process objection to the delay in the forfeiture proceeding itself.

[21] If the procedures initially adopted by an agency for discharging its responsibilities are unfair or ineffectual, it is likely that pressures will be brought to bear, through public complaint or legislative oversight, to improve them.

remission petition means that some process is due, but it does not answer the question whether the required process encompasses a right to a speedy disposition of that petition. Due process is a "flexible" concept that "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Basically, due process guarantees that a proceeding be fair; "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). As noted above, the Customs Service has established detailed procedures for the equitable processing of remission petitions, and respondent, who filed both an initial remission petition and a detailed supplement prepared with the assistance of counsel, has not complained that he was given an inadequate opportunity to present his case and never complained during the administrative process that a decision was being unreasonably delayed.

It is true, of course, that the procedural protections provided by the Due Process Clause must be provided "at a meaningful time" (*Armstrong* v. *Manzo*, 380 U.S. at 552) and therefore that, in some contexts, delay theoretically can violate due process (see *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979)). But unless a delay is so lengthy (or the benefit in question so time-sensitive) that the delay has the practical effect of seriously undermining the usefulness of the decision, the right to a speedy disposition is not ordinarily considered one of the essential attributes of due process. Thus, even in situations where the property or liberty deprivation is considerably more serious than that involved here, the Court has repeatedly found no constitutional problem with decisional processes that take significantly longer than the few weeks involved in this case. For example, in *Cleveland Board of Education* v. *Loudermill*, slip op. 13-14, the Court found no constitutional problem with an unexplained delay of nine months in providing a post-termination hearing con-

cerning the correctness of a decision to discharge a person from employment. In *Mathews* v. *Eldridge*, *supra*, the Court recognized that the hardship imposed by a termination of Social Security disability payments was "significant" (424 U.S. at 342), but it nonetheless found no due process problem with the postponement of the required hearing until more than a year after termination of the benefits (*id.* at 341-343). See also *Heckler* v. *Day*, slip op. 15 (characterizing court-imposed deadlines for consideration of disability claims as an "unwarranted judicial intrusion").

The Court has recognized a due process right to a speedy disposition in two contexts, but those decisions highlight the inappropriateness of finding a due process prohibition against delay here. In *United States* v. *Lovasco*, 431 U.S. 783 (1977), the Court found that a delay in bringing an indictment could, in certain limited circumstances, give rise to a due process violation. The Court's holding was limited to the situation where the government conduct violated standards of "fair play and decency," such as an intentional delay designed to gain a tactical advantage over the defendant, and where the delay prejudiced the defendant's ability to present his case at trial. See *id.* at 795-796. And in *$8,850*, of course, the Court held that undue delay in providing a forfeiture hearing could violate due process because of the deprivation of the use of the seized property. 461 U.S. at 563-565. In both cases, however, the Court found that a decisional delay of 18 months did not violate due process.

The remission context is fundamentally different from the above situations, and there is no need to create an independent constitutional right to a speedy disposition in order to guarantee due process in the administrative proceeding. The basis for the right to a speedy judicial forfeiture proceeding recognized in *$8,850* is the fact that the claimant is deprived of the use of the property—to which he may have a valid claim—until the hearing is held to resolve the forfeitability of the property. In other words,

a delay in the forfeiture proceeding results in a temporary deprivation of the claimant's property in the event that the property ultimately is held not to be forfeitable. By definition, however, delay in the remission proceeding cannot result in the deprivation of use of the claimant's property. The underlying premise of a remission petition is that the property is forfeitable;[22] the claimant seeks to have the penalty eliminated or reduced because of mitigating factors. In essence, the claimant concedes that the property belongs to the government, but, as a matter of executive grace, he requests that part of the forfeited value be remitted to him. Indeed, the courts have recognized that when the property is forfeitable, it becomes the government's property as of the time of seizure. See *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). Plainly, the claimant should have no distinct constitutional right to speedy disposition of his remission petition (as opposed to a determination of the forfeitability of the property) when he is not being deprived of the use of *his* property during the pendency of the petition. Because the property in question is recognized—for purposes of the administrative remission proceeding—as belonging to the government, delay in that proceeding cannot affect a property interest of the claimant.

2. Importing constitutional time constraints on the consideration of remission petitions will adversely affect the interest of claimants in obtaining remission or mitigation

The creation of a due process right to a speedy disposition of a remission petition is not only theoretically

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[22] If the claimant wishes to contest forfeitability, *i.e.*, the assumption that it is the government that has the legitimate claim of ownership of the property, the forfeiture hearing is the place to do so. There, the Due Process Clause protects his right to a reasonably prompt determination. By the same token, if the claimant has any objection to the lawfulness of the seizure, he may file a motion for return of property under Rule 41(e) of the Federal Rules of Criminal Procedure.

unsound, it is unwise as a practical matter because it would actually disserve the primary goal of the Due Process Clause. The general purpose of due process protections is simply to promote fairness; more specifically, their "primary function * * * is to minimize the risk of erroneous decisions." *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979); see generally *Mathews* v. *Eldridge*, 424 U.S. at 335. Obviously, that purpose is undermined in the remission context if the decisionmaker is not given adequate time to consider the merits of a petition. But the drastic consequences of a finding of a due process violation in the remission process as a result of delay—*i.e.*, barring imposition of any penalty for smuggling even though there is no challenge to the substantive validity of the penalty [23]—creates a strong pressure on the decision-

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[23] In the event that the delay here is found to be a due process violation, it nevertheless cannot be a proper remedy for respondent to be absolved of all liability for his violation of the law—in effect a dismissal with prejudice of the forfeiture action. See *United States* v. *Morrison*, 449 U.S. 361 (1981). Punitive damages against the government are not permitted, so any remedy must be limited to whatever damage respondent actually suffered as a result of the violation. It seems apparent that there was no such damage here. Theoretically, a delay could prejudice the claimant's ability to defend against the forfeiture action, but there is no allegation that such was the case here; indeed, the court of appeals agreed that the property was forfeitable (Pet. App. 4a n.3). In any event, any prejudice to the defense of the forfeiture action ought to be subsumed within an *$8,850* claim of undue delay in processing the forfeiture, not the remission. It is difficult to imagine how the delay conceivably could prejudice the claimant's chances of getting favorable action on the remission petition itself and, again, there is no such allegation here. The only damage that it seems a claimant could suffer from a delay in the remission proceeding is the loss of the use of the money for the period of undue delay, *i.e.*, interest (which assumes that he has some right to remission at a given time in a given amount). Respondent has not alleged how he was harmed at all by the 36-day period taken to rule on his petition, much less how he could have been harmed to the tune of $3,600 (the mitigated penalty) or $24,500 (the amount of respondent's liability if he had declined to accept the offer of mitigation). Thus,

maker to place speedy disposition above all other considerations, at the expense of a careful weighing of the merits of the petition. In general, when a judicial standard of a reasonably prompt determination is imposed, the administrative agency has no way of knowing what amount of time might later be considered "reasonable" by the courts. Indeed, because of the strain that enormous numbers of remission petitions place on the limited manpower available to process them, it is likely in this context that what the agency perceives as reasonable speed in processing a petition sometimes will be found by a court, which looks only at the case before it, to have been unreasonably slow. Therefore, if a due process right to a speedy disposition is imposed, the Customs Service would have a strong incentive to rule on remission petitions as quickly as possible, even if it has not had the opportunity to give them adequate consideration, in order to avoid the possibility of litigation and perhaps invalidation of its forfeiture on the ground of undue delay.

This general problem inherent in any right to a speedy disposition is exacerbated here because of the extremely short time frame apparently contemplated by the court of appeals. In its original decision, the court stated that 24 hours ought to be the maximum time available for considering remission petitions in ordinary cases (Pet. App. 31a-32a); in its second decision, the court drew back from this rigid position, but still strongly intimated that the 36 days involved here was far too long (*id.* at

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it appears that under no circumstances can he be entitled to recover more than an insignificant interest award or nominal damages. See *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978).

In the absence of any genuine damage, allowing respondent to escape liability for his infraction because of delay in processing his remission petition is a completely unjustified windfall that undermines the congressional purpose to strike at customs violations through the pocketbook of the offender. It is tantamount to using mere delay as a basis for estopping the government from enforcing the law, which this Court has unequivocally rejected. See *INS* v. *Miranda*, 459 U.S. 14, 18 (1982).

7a-12a). This approach reflects a complete failure to appreciate the practicalities of the remission process and the steps that must be undertaken in order to provide equitable and reasoned disposition of petitions. Indeed, if Customs itself had adopted regulations requiring disposition with such haste, we think the increased risk of arbitrary decisionmaking inherent in such procedures would make them far more vulnerable to due process attack than the existing procedures.

As described above (note 18, *supra*), the Customs Service has established detailed procedures for processing remission petitions. Customs often must investigate the basis for the factual allegations in the petition and make other inquiries, which may concern events and circumstances beyond those at the site of the seizure or submission of the petition. As detailed in an affidavit executed by the Director, Entry Procedures and Penalties Division, Office of Regulations and Rulings, United States Customs Service (Pet. App. 41a-50a), which was filed with the government's rehearing petition, there are numerous factors that are relevant in deciding the extent to which relief should be granted.[24] An assessment of these factors may require factual investigation, which requires both time and manpower. The Director's affidavit states that most decisions on petitions for remission normally take more than 30 days and, in a large number of cases, at least three to six months is needed for Customs to collect the information necessary to make an informed decision even if it gives high priority to an application over other pending matters (*id.* at 45a, 47a, 49a).

Indeed, the factors that necessitate more extended consideration of petitions than the court of appeals seems

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[24] For example, Customs considers whether the violation occurs in connection with a commercial shipment or an importation for personal use; whether the petitioner has a previous record for Customs or criminal violations; whether the violation was negligent or willful; and the validity of a claim that forfeiture would create an extraordinary financial hardship (Pet. App. 46a-47a).

willing to accept are well illustrated by this case. See Pet. App. 47a-48a. A responsible decision on respondent's petition required at a minimum an inquiry (that could potentially extend all the way to Switzerland) into respondent's ownership interest in the seized vehicle, which was registered in the name of Grace Blote, its intended recipient (C.A. App. 11), and the possibility that the vehicle was being brought into this country for commercial purposes. In addition, the District Director was required to consider respondent's allegations that the Customs inspector had never asked him whether he had anything to declare and that respondent lacked any intent to avoid paying his customs duty (J.A. 12, 15-16). To evaluate these claims required at least some inquiry into respondent's background, which could not reasonably be based exclusively on respondent's self-serving statements about his reputation and the amount of duty he had paid on other occasions. See J.A. 12, 16. Taking into account the enormous number of remission petitions that must be processed,[25] it is difficult to see how Customs can be condemned for taking five weeks to reach a decision on this petition. The fact that the court of appeals has found this time frame inadequate graphically illustrates the difficult position in which the Customs Service is placed by the due process right created below and manifests why the agency will be impelled in the future to reach remission decisions as hastily as possible, at the expense of informed and reasoned decisionmaking.

The fact that the remission decision is committed to the Secretary of the Treasury's unreviewable, unfettered discretion makes it even less appropriate to impose a constitutional requirement of a speedy disposition in the remission context. It is undoubtedly true that a claimant may desire a prompt ruling on his remission petition even if he has no opportunity to seek review of that decision and

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[25] The Customs Service processes more than 50,000 noncontraband forfeitures per year, and petitions for remission or mitigation are filed in 90% of those cases. *$8,850*, 461 U.S. at 558. Thus, close to 200 petitions are filed on an average work day.

even if it turns out to be unfavorable. See *Johns* v. *McKinley*, 753 F.2d 1195, 1203 (2d Cir. 1985).[26] But that does not mean that it is sensible policy to have a speedy disposition requirement. If there are reviewable standards that govern an administrative decision, the pressure to forgo careful consideration of that decision in order to satisfy a timeliness requirement is balanced somewhat by the possibility that a hasty, ill-considered decision may be reversed on appeal. Here, however, there is no countervailing requirement that would keep the Secretary from giving short shrift to petitions in order to avoid violating a speedy disposition requirement. Under the court of appeals' decision, there is nothing that prevents the Secretary from rendering completely arbitrary decisions so long as they are speedy. Indeed, the most logical response to the severe time constraints imposed by

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[26] Contrary to the view of the *Johns* court, this desire does not provide a basis for finding a property interest in the outcome of the remission proceeding that generates a constitutional right to a speedy disposition. The fact that the claimant wants a prompt resolution of his petition, just like the fact that he wants and expects a favorable resolution of his petition because many other petitions are granted as a matter of practice, does not create a property interest. His desire is just a "unilateral hope" (*Dumschat*, 452 U.S. at 465; see also *Board of Regents* v. *Roth*, 408 U.S. at 571); he has no entitlement to any particular disposition of his petition either with respect to the merits or the timing. Those are matters left to the Secretary's discretion. See Part I, *supra*. By the same token, for reasons discussed above (pages 19-20, *supra*), the *Johns* court errs in holding (753 F.2d at 1202-1203) that the claimant's original ownership interest in the seized vehicle established a property interest in the remission proceeding. First, the ownership of forfeitable property is transferred to the government as of the time of the seizure. *United States* v. *Stowell*, 133 U.S. at 16-17. Second, the remission proceeding is premised on the assumption that the claimant no longer has a legitimate claim to ownership of the property. Hence, the original ownership interest is assumed to have been extinguished, just like a prisoner's undeniable pre-conviction liberty interest in being free from confinement (*Greenholtz*, 442 U.S. at 7), and it can provide no basis for attaching the protections of the Due Process Clause independently to the remission proceeding. Thus, the efforts of the *Johns* court to distinguish *Dumschat* are unavailing.

the decision below would be for the Secretary simply to deny petitions that he cannot definitely decide to grant in very short order.[27] The matter would then be referred under 19 U.S.C. 1603 to the United States Attorney for the institution of judicial forfeiture proceedings (or, if the value of the seized property is small, would proceed to administrative forfeiture proceedings).

Thus, the ultimate result of the due process right established by the court of appeals is that many cases that are now settled administratively would instead be resolved in forfeiture proceedings.[28] This result runs contrary to the congressional purpose in establishing the remission and mitigation remedy, which is designed to promote administrative, rather than judicial, resolution of claims resulting from Customs seizures. Moreover, increasing the number of cases resolved through judicial proceedings, instead of through the less formal and less costly remission procedure, will impose substantial burdens on the government and on the courts that must

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[27] Failing to act on a remission petition with speed (or haste) sufficient to satisfy a reviewing court can have adverse effects beyond the loss of the forfeiture. Both courts of appeals that have found a constitutional right to speedy disposition of a remission petition have also found that that right can easily give rise to personal *Bivens* liability for government officials, ranging from a relatively lower-level official such as a Customs Service District Director (*Seguin* v. *Eide*, 720 F.2d 1046 (9th Cir. 1983), on remand from 462 U.S. 1101 (1983), vacating and remanding 645 F.2d 804 (9th Cir. 1981)) to the head of the seizing agency (*Johns* v. *McKinley*, *supra*), even in the absence of intentional misconduct.

[28] The Director's affidavit in this case states that in 95% of car seizure cases in which remission petitions are filed, the case is settled administratively without the necessity of instituting forfeiture proceedings, *i.e.*, the vehicle is returned upon payment of a mitigated amount (Pet. App. 49a). If the decision below induces Customs to act on all petitions within 30 days, even when that period is insufficient to make an informed decision to grant relief, many of these cases (perhaps as many as 70% (*id.* at 49a, 50a)) would be denied administratively and referred for forfeiture proceedings instead of being settled administratively through the remission process.

adjudicate those proceedings. See *$8,850*, 461 U.S. at 566; *Ivers* v. *United States*, 581 F.2d at 1370.

Most important, reducing the number of cases settled through the remission procedure will seriously disadvantage the claimants themselves. Ordinarily, and this was certainly true in respondent's case, a claimant's only realistic hope of reacquiring any of his seized property is the remission process. The circumstances of the seizure of the property are usually such that judicial proceedings will inevitably result in a finding of forfeitability—and the forfeiture proceeding is an all-or-nothing affair. Thus, speedy denial of a remission petition because of time constraints is rarely in the claimant's best interest. See *$8,850*, 461 U.S. at 566.[29] In sum, the effect of creating a constitutional right to a speedy disposition of a petition for remission or mitigation is antithetical to the basic goals of due process—promoting fair and error-free determinations—and is actually adverse to the general interests of claimants as a class. Hence, even if there is some due process protection that attaches to the remission procedure, the protection "called for" in that context (*Morrissey* v. *Brewer*, 408 U.S. at 481) does not include a right to a speedy disposition.[30]

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[29] Ordinarily, if property is declared forfeited in a judicial proceeding, the claimant has the option of filing a petition for remission or mitigation with the Attorney General. 28 C.F.R. 9.1 *et seq.* Such a petition will not be entertained, however, in cases where an administrative petition was filed with the Secretary of the Treasury and denied. 28 C.F.R. 9.3(g).

[30] This is not to say that a claimant has no remedy if the Customs Service unreasonably delays acting on a petition for a considerable length of time. Under the Administrative Procedure Act, the claimant can bring a suit to compel agency action that is "unreasonably delayed." 5 U.S.C. 706(1). The remedy available in such a suit would be responsive to the complaint; the agency would be ordered to act promptly if it is delaying unreasonably. See *Heckler* v. *Day*, slip op. 15 n.33. There is no justification, however, for what respondent has done here under the cover of the Due Process Clause, *i.e.*, sit back quietly until the agency acts and then bring suit to alter the substantive rights of the parties by invalidating the forfeiture on the ground that the agency did not act quickly enough.

B. Even If A Constitutional Right To A Speedy Disposition Of A Remission Petition Does Exist, The Processing Of Respondent's Petition Did Not Violate That Right

Even assuming, contrary to our primary submission, that the Due Process Clause does guarantee a claimant the right to a speedy disposition of his remission petition, the court of appeals' conclusion that that right could have been violated in this case cannot possibly be correct.

1. At the outset, we believe that the court erred in assuming that respondent's claim should be governed by reference to the four-factor test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), for assessing alleged violations of the Speedy Trial Clause. The due process protection against undue delay found here by the court is most closely analogous to the due process protection against excessive preindictment delay recognized in *United States* v. *Lovasco*, *supra*. In *Lovasco*, the court not only found that a due process claim could not be pressed unless the government conduct violated standards of fair play and decency, it also noted that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 U.S. at 790. The right of prompt disposition recognized by the court of appeals here, which does not appear to depend at all on the existence of prejudice and certainly is not limited to cases of government misconduct, generally is appropriate only when considering rights conferred by a specific provision of the Constitution and not when applying the general protections of the Due Process Clause.

The Court did suggest in *$8,850* that a due process claim based on delay might be possible in some circumstances in the absence of demonstrable prejudice, but that conclusion makes sense only in the specific context involved in *$8,850*, which, as the court of appeals itself recognized (Pet. App. 6a-7a), is significantly different from that involved here. The judicial forfeiture proceeding—the timing of which was at issue in *$8,850*—is the final step in the legal path triggered by the seizure

of forfeitable property. It therefore was logical for the Court in *$8,850* to look for guidance to cases arising under the Speedy Trial Clause, an analogous situation involving the delay in holding the final step (the trial) in the chain of judicial events triggered by an indictment. But the claim here is not analogous to a speedy trial claim; a petition for remission or mitigation is an optional, and collateral, administrative remedy that plainly is not automatically set in motion by the seizure of forfeitable property. Hence, despite *$8,850*, a due process claim of delay in acting on a petition for mitigation ought not to be resolved by immediately invoking the *Barker* factors. Instead, some showing of prejudice caused by the delay ought to be a prerequisite to the claim, just as *Lovasco* holds that prejudice is a prerequisite for a claim of preindictment delay.

2. Even assuming that the court of appeals was correct in applying the *Barker* factors to determine whether a delay in ruling on a remission petition violates due process, the court manifestly erred in holding that application of those factors to this case could possibly result in finding a violation. The court of appeals' analysis of the four factors grossly deviates from the approach contemplated in *Barker* and *$8,850*.

a. Under the four-factor analysis set forth in *Barker* v. *Wingo*, *supra*, the length of the delay is a factor that "triggers" consideration of the other factors. 407 U.S. at 530. In other words, unless the delay in question is so long as to be "presumptively prejudicial" (*ibid.*), the speedy trial claim is rejected without the need to consider the other factors. It seems apparent that the amount of delay needed to trigger the *Barker* balancing test in the speedy trial context ought to be considerably less, at least in the absence of unusual circumstances, than that needed to trigger the test in the forfeiture remission context. First, in the speedy trial context the claim is based on a specific constitutional provision that guarantees a speedy disposition, as compared to the general protections of the Due Process Clause. Moreover,

the deprivation in the speedy trial context that gives rise to the constitutional claim—loss of liberty—is considerably more grievous than the alleged deprivation of property in the remission context. See *$8,850*, 461 U.S. at 565 n. 14. Be that as it may, even if the identical standards ought to be applied in these disparate contexts, it is manifest that 36 days is altogether too short a period of time to trigger consideration of the other *Barker* factors. See, *e.g.*, *United States* v. *Struyf*, 701 F.2d 875, 879 (11th Cir. 1983) (seven month delay does not trigger consideration of other *Barker* factors); *United States* v. *Nance*, 666 F.2d 353, 360 (9th Cir.), cert. denied, 456 U.S. 918 (1982) (five months); *United States* v. *Elorduy*, 612 F.2d 986, 988 (5th Cir. 1980) (six months). See also *United States* v. *MacDonald*, 456 U.S. 1, 11 (1982).

The cases that have considered allegations of a due process violation (as opposed to a violation of the Speedy Trial Clause) based on delay confirm that the time frame here was entirely too short even to raise the possibility of a constitutional violation. In both *$8,850* and *Lovasco* a delay of 18 months was held insufficient to establish a due process violation.[31] In *Cleveland Board of Education* v. *Loudermill*, slip op. 13-14, the Court found that a nine-month delay, without more, did not raise a due process question. See also *Mathews* v. *Eldridge*, 424 U.S. at 341-343 (recognizing validity of delay of more than a year between termination of disability benefits and required hearing). Against this background, it seems manifest that the court of appeals erred in concluding that a delay of less than six months in processing a remission petition could even trigger consideration of the *Barker* factors, much less actually establish a due process violation. A fortiori, there can be no constitutional violation in this case, where the delay in question was of a wholly

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[31] In *$8,850*, the Court did find that the 18-month delay was sufficiently long to trigger consideration of the other factors of the *Barker* balancing test.

different order of magnitude, a mere 36 days.[32] In sum, the unreasonably short time frame imposed by the court of appeals would not further due process; the pressure it would impose on the agency "would subordinate the goal of 'orderly expedition' to that of 'mere speed.'" *Lovasco*, 431 U.S. at 795 (quoting *Smith* v. *United States*, 360 U.S. 1, 10 (1959)).

3. In addition to the fact that the court of appeals erred in holding that the short delay here triggered consideration of the other *Barker* factors, the court seriously erred in its application of those factors. The analysis contemplated by the court of appeals and "suggested" to the district court (Pet. App. 9a-12a) is completely misdirected because it fails to focus on the conduct that is actually alleged to constitute the due process violation. The court looked to the prejudice resulting from the *seizure* itself, such as the potential consequences of depriving an individual of a means of transportation for an extended period of time (see Pet. App. 12a), but

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[32] The absurdity of the court of appeals' conclusion that the Customs Service acts unreasonably when it takes 36 days to investigate and rule upon a petition for remission or mitigation is highlighted by examining the time frames that ordinarily attach to other steps in the process that is set in motion when property is seized as forfeitable. The claimant, who presumably is fully conversant with all the facts surrounding the seizure and hence need not spend any time investigating, is allowed 60 days just to file his petition for remission or mitigation. 19 C.F.R. 171.12(b). If the case is not settled administratively, the Court has held that there is nothing inherently objectionable in 18 months' delay before the judicial proceeding is instituted (*$8,850, supra*), let alone decided by the district court. And other judicial proceedings in connection with the forfeiture, such as appeals, also may take a considerable length of time. For example, in this case the 36 days taken to act on the remission petition seems somewhat insignificant in light of the fact that the case remains in litigation more than ten years after respondent's vehicle was seized. Almost four years passed between the filing of respondent's complaint and the original decision of the district court (J.A. 1-3). Respondent's appeal from that decision was pending in the court of appeals for two years (J.A. 6-8), and it took the court of appeals an additional ten months to rule on the case a second time after it was remanded by this Court (J.A. 9-10).

the alleged due process violation arises not from the seizure at all, but from the time taken to process a petition for remission. It must be remembered that the class of cases under consideration involves vehicles for which there is probable cause to believe that they have themselves been smuggled into the country (as here) or have been employed for the transportation of illegal drugs or other contraband. Generally, the claimant has no basis for objecting to the seizure itself.[33] The purpose of the remission process is simply to consider whether there are extenuating circumstances that might justify amelioration of the penalty of forfeiture. In short, a person who attempts to smuggle a vehicle or contraband across the border should be held to have assumed the risk of any inconvenience that might result from its seizure and has no right to raise a constitutional objection based on that inconvenience. If a due process violation is claimed because of excessive delay in the remission process, it must be based on the prejudice resulting from that delay, not from the seizure.

This pervasive error by the court of appeals renders meaningless much of its *Barker* analysis. For example, one of the four *Barker* factors is whether the defendant (or, here, the claimant) asserted his right to a speedy disposition. 407 U.S. at 528-529, 531-532. This factor was recognized by the Court as an important one; it noted in *Barker* that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial" (*id.* at 532). Here, the court of appeals disposed of this factor quite simply, stating that respondent "filed his petition for remission at the time his vehicle was seized, which seems a sufficient assertion of his rights" (Pet. App. 11a). To be sure, the mere filing of a remission petition almost certainly demonstrates the claimant's unhappiness with the seizure and his desire to avoid, if possible, forfeiture of the total value

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[33] If the lawfulness of the seizure is being disputed, the forum provided for that inquiry is a motion for return of property under Fed. R. Crim. P. 41(e).

of the seized property. But it does not say anything about the claimant's expectations or demands with respect to the timing of the ruling on the petition, which is the crucial issue in this setting. The issue presented here cannot arise unless a remission petition is filed, so the court of appeals' approach has the effect of eliminating one of the *Barker* factors by weighing it in favor of the claimant in every case.

In fact, the circumstances here strongly indicate that respondent did not assert his "right" to a disposition of his remission petition in less than 36 days, nor did he desire such a speedy resolution. After he filed his initial handwritten petition (J.A. 12), respondent retained counsel and filed a detailed supplemental petition, less than two weeks before his petition was acted upon. And respondent sought further administrative review of the mitigation decision when it was issued (J.A. 18-19). Had Customs acted upon respondent's remission petition within three weeks, *i.e.*, before the supplemental petition was filed, he might well have complained that the hasty action deprived him of due process. At any rate, respondent took no action that could reasonably be construed as an assertion of a right to a speedy disposition of his remission petition.

The court of appeals' discussion of prejudice, which ought to be a prerequisite to any due process claim here (see pp. 37-38, *supra*), is similarly flawed. The court did not suggest any way in which respondent was prejudiced in his defense of the forfeiture action or the resolution of the remission petition—the kind of prejudice recognized as relevant in *$8,850*. See 461 U.S. at 569-570; see also *Lovasco*, 431 U.S. at 789-790, 796. The court noted that the claimant may be prejudiced by inconvenience or disruption of travel plans caused by the seizure (Pet. App. 12a). In particular, the court emphasized the severe prejudice inherent in a vehicle seizure because it leaves a traveler stranded "without transportation at a remote border point" (*id.* at 10a; see *also* id. at 26a). But such a claim of prejudice can be

material only to the decision whether due process requires action within *hours* of a seizure—a rule the court of appeals itself recognized on remand as inappropriate.[34]

A due process rule that allows even a few days to investigate and act upon the petition will not help the claimant with his "stranding" problem because, in any event, the decision will come when he is no longer stranded. Needless to say, a claimant is not immobilized at the border during the entire period his remission petition is pending. Procedures exist to permit the claimant to obtain the return of his vehicle; he can post a bond in the amount of the value of the vehicle. That is what respondent did in this case, two weeks after the seizure, at which time the Jaguar was released to him (Pet. App. 19a). Indeed, there is nothing in the record to show why he could not have posted a bond and obtained possession of the car within a day or two had he wished to do so.[35]

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[34] In its original decision, the court of appeals stated that remission decisions would be presumed to be unconstitutionally tardy if they were issued more than 24 hours after the filing of the petition (Pet. App. 31a-32a). The court wisely drew back from that impossible standard in its decision on remand. It seems likely that in many cases 24 hours would not even be enough time for the decisionmaker to receive the petition filed at the border, much less have an opportunity to investigate its allegations and reach a reasoned decision. The court's original 24-hour standard, however, sheds some light on the court's narrow focus on the immediate inconvenience of the seizure in its consideration of the *Barker* factors. If remission or mitigation is granted within 24 hours, the inconvenience to an individual of losing his car can be alleviated by that administrative decision, and therefore it makes some sense to characterize a failure to reach a decision within 24 hours as prejudicing the claimant's ability to travel. But once the 24-hour standard is abandoned, the factors relied upon by the court of appeals manifestly become completely irrelevant. Once it is conceded that the remission process may extend beyond the day or two necessary for the claimant to post a bond for his car or otherwise obtain substitute transportation, further delay does not leave him "stranded at the border" or otherwise interfere with his ability to travel.

[35] Respondent stated to the Customs officer at the time of the seizure that it would be "no problem" for him to obtain the funds

Moreover, even before respondent reclaimed possession of his car, it can hardly be said that he was left stranded at the border. On the contrary, the Customs agent arranged for transportation for respondent to the nearest town, from which respondent arranged to fly home in his private plane, which was waiting in Seattle (Tr. 51-52). In other words, the "prejudice" relied upon by the court of appeals was essentially unrelated to the timing of the remission decision; that prejudice would have been unchanged even if the remission decision had been rendered considerably faster. The inconvenience suffered by respondent when his effort to escape paying duty on a $24,500 foreign automobile was thwarted was fairly ascribable to his own misdeed and not to any unfairness in the processing of his petition for administrative clemency.

In sum, examined in the proper light, *i.e.*, focusing on the delay in processing the petition, the *Barker* v. *Wingo* factors cannot possibly be found to support a due process claim in this case. The length of the delay was entirely too short to suggest any constitutional deficiency. This short delay was almost certainly ascribable to the need to investigate the contentions raised by and assess the merit of respondent's petition for remission.[36] Respondent did not assert a right to, or desire for, a speedy disposition of his remission petition. Finally, there is no suggestion how the delay in acting on the petition (as distinct from the seizure itself) could possibly have preju-

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to secure release of the car (Tr. 157, 159). Moreover, respondent testified that he was familiar with Customs "informal entry" procedures that would have required him to post a bond in the amount of the value of the car in order to be allowed to go on his way (Tr. 67).

[36] The reasons for the delay thus far have never been at issue in proceedings in the district court, and therefore they are not reflected in the record. Nonetheless, the court of appeals found it appropriate to "suggest" to the district court that "[i]t appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition" (Pet. App. 11a).

diced the claimant in a manner analogous to that contemplated in *$8,850—i.e.*, in reducing his chances for a favorable disposition of his remission petition (see 461 U.S. at 569-570)—or, indeed, in any other way. Respondent's complaint boils down to no more than the desire to receive a sum of money sooner—money that indisputably is the property of the government and to which he had no legal entitlement.[37] In short, the court of appeals' remand order, with its suggestion that the district court could find a due process violation because of the 36-day consideration period in this case, is gravely flawed.[38]

Moreover, the broader implications of the court of appeals' application of the *Barker* factors to the facts of this case are quite disturbing. In essence, the court of appeals has distilled *Barker* into a single factor test for delays in acting on remission petitions. Since, under the court's analysis, even a very short delay triggers the inquiry, the mere filing of the petition satisfies the demand requirement, and inconvenience caused by the seizure is treated as prejudice caused by the delay, it would appear that three of the *Barker* factors will be weighed in favor of the claimant in almost every case of this

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[37] Thus, despite the court of appeals' suggestion that its rule may be restricted to the seizure of automobiles, the logical implication is that the due process right created below would apply equally to the processing of remission petitions in connection with the seizure of any other goods.

[38] The error of the court of appeals' decision may perhaps most clearly be demonstrated by considering what the analogous rule would be as applied to seizure of the person—an event surely as inconvenient to the individual as the seizure of his automobile. Under such a rule, an individual who had been arrested on probable cause to believe he had committed a crime and who asked the prosecutor to consider a plea bargain or dismissal of all charges could not be prosecuted at all if the prosecutor failed to give a final response to such a proposal within the short time frame suggested by the decision below. No one would seriously propose such a rule in the case of arrests, and we are at a loss to understand why it should apply to seizures of property.

kind. The due process question will turn entirely on the reasons for the delay. If Customs can show that, under the circumstances, it could not possibly have acted on the petition more quickly, the due process claim will be denied. Otherwise, the claim will be granted and the forfeiture invalidated. This formula for excessive judicial intrusion into the administration of a remedy of executive grace perverts the Due Process Clause and, if allowed to stand, can be expected to yield hasty decision-making to the detriment of the government and claimants alike.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 84 1144

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

BRIEF FOR RESPONDENT JOHN VON NEUMANN

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QUESTIONS PRESENTED

1. Does the protection of due process apply to persons petitioning for remission of penalties under 19 U.S.C. 1618 after seizure of a vehicle?

2. Assuming the Due Process Clause applies, does it include some standard of a reasonable time period within which a decision on the petition must be made?

3. Was the 36 day time period expended in determining the petition for remission in this case unreasonable as a matter of law, reasonable as a matter of law, or subject to determination by the District Court on remand?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provision and Statutes Involved	2
Summary of Argument	3
Argument	
I. Due process protection applies to petitions for remission under 19 U.S.C. 1618.	6
II. Due process protection does include the right to a determination of the petition for remission within a reasonably prompt period.	9
III. The 36 day delay in processing respondent's petition for remission was unreasonable as a matter of law, and the $3600 fine should be returned to respondent. At the very least, it is a question of fact for the District Court to determine whether the delay was unreasonable under the standards set forth in §8850.	13
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Armstrong v. Manzo, 380 U.S. 545 (1962) 5, 10

Barker v. Wingo, 407 U.S. 514 (1972) . . 12

Cleveland Board of Education v. Loudermill, 84 L.Ed. 2d 494 (1985) 10

Fuentes v. Sheven, 407 U.S. 67, rehearing denied 409 U.S. 902 (1972) 14

Heckler v. Day, 81 L.Ed. 2d 88 (1984) . . 11

Ivers v. United States, 581 F. 2d 1362 (9th Cir. 1984) 7

Johns v. McKinley, 753 F. 2d 1195 (1985) 3, 6, 10, 12, 15

Lee v. Thorton, 538 F. 2d 27 (1976) 5, 12, 14

Matthews v. Eldridge, 424 U.S. 319 (1976) 5, 10

Seguin v. Eide, 720 F. 2d 1046 (9th Cir. 1984) 14

Stypmann v. City and County of San Francisco, 557 F. 2d 1338 (1977) . . 12, 14

United States v. $8850, 461 U.S. 555 (1983) . . . . . passim

United States v. Lovasco, 431 U.S. 783 (1977) 12

United States v. Stowell, 133 U.S. 1 (1980) 7

United States v. Von Neumann, 660 F. 2d 1319 (1981) 7

Constitution and Statutes:

U.S. Const. Amend. V 2, 4

Due Process Clause . . . i, 4, 7, 8, 9, 11

28 U.S.C. 1254 (1) 2

19 U.S.C. 1497 2

19 U.S.C. 1602 7

19 U.S.C. 1618 . . . . . i, 2, 3, 6, 12, 16

In the Supreme Court of the United States

October Term, 1985

No. 84 1144

United States of America, Petitioner

v.

John Von Neumann

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT JOHN VON NEUMANN

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-12a) is reported at 729 F. 2d 657. The previous opinion of the Court of Appeals (Pet. App. 15a-32a) is reported at 660 F. 2d 1319.[1] The findings of fact and conclusions of law of the District Court (Pet. App. 35a-40a) are unreported.

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[1] That opinion as reported does not contain the modifications that the Court of Appeals made to its decision in denying the government's petition for rehearing. See Pet. App. 33a-34a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1984. A petition for rehearing was denied on September 18, 1984 (Pet. App. 13a-14a). On December 6, 1984, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to January 15, 1985. The petition was filed on that date and was granted on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if writter declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine,

penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

Respondent accepts the factual statement set forth in the Brief of the United States, pages 2-8.

SUMMARY OF ARGUMENT

I.

Due process protection applies to petitions for remission under 19 U.S.C. 1618.

Johns v. McKinley, 753 F. 2d 1195, 1203 (2d. Cir. 1985) stated that the owner of a seized vehicle "was seeking to protect an existing cognizable property interest. He was the owner of the cab; and his ownership had not been extinguished by a declaration of forfeiture." This authority answers the government's contention that due process does not apply because no propery interest is involved after seizure.

The government's argument that a petition for remission is an admission of forfeitability was rejected by this Court in United States v. $8850, 461 U.S. 555, 566 (1983). The Court said: "The claimant need not waive his right to a prompt judicial hearing simply because he seeks the additional remedy of an administrative petition for mitigation."

Respondent is not like a prisoner in custody as the government contends. Respondent is a person who was deprived of his property with-

out a hearing. Unlike a penal authority deciding whether to release a prisoner, the government benefits greatly from the remission procedure because it may "obviate the need for judicial proceedings. This delay can favor both the claimant and the government..." (United States v. $8850 at page 566)

The government concedes at page 10 of its brief: "The Due Process Clause applies to the deprivation of the claimant's ownership interest in the seized property..."

This court in $8850 noted, and the government agrees, that the petition for remission is one step in the entire process by which the final rights and obligations of property owners and the government are determined in seizure cases.

Since the Fifth Amendment forbids depriving a person of his property without due process of law, and since a person is deprived of his property during the period of consideration of the petition for remission, due process applies to the petition for remission procedure. Applicability of the Due Process Clause is more clear because a petition for remission is an integral part of the administrative and judicial process by which the individual's property interest is determined.

II.

Due process protection does include the right to a determination of the petition for remission within a reasonably prompt period.

The government has not cited a single case which holds that an element of due process does not include the right to a reasonably prompt determination of the issue involving the right or property. On the contrary, the government concedes at page 27 of its brief: "Basically, due process guarantees that a proceeding be fair; '[t]he fundamental requirement of due

process is the opportunity to be heard at a meaningful time and in a meaningful manner', Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1962)."

This language is almost identical to that used by this Court in United States v. $8850, 461 U.S. at pages 562-563 where it posed the question before it as "when a post-seizure delay may become so prolonged that the disposed property owner has been deprived of a meaningful hearing at a meaningful time."

The Ninth Circuit in the case at bar and the Second Circuit in Lee v. Thornton, 538 F. 2d 27 (1976), recognized the vital needs of individuals to have the use of their vehicles, and to have a prompt determination of their rights to recover their vehicles if they are seized. A person whose property is seized should be able, within a reasonably prompt period of time, to make plans to resist a judicial forfeiture proceedings, or to acquire a substitute vehicle. The government so concedes at pages 33-34 of its brief where it states: "It is undoubtedly true that a claimant may desire a prompt ruling on his remission petition even if he has no opportunity to seek review of that decision and even if it turns out to be unfavorable."

The length of time which may be imposed upon the Secretary of the Treasury to act upon petitions for remission may be open to debate, but that some standard of reasonable promptness is required cannot be doubted.

III.

The 36 day delay in processing respondent's petition for remission was unreasonable as a matter of law, and the $3600 fine should be returned to respondent. At the very least, it is a question of fact for the District Court to determine whether the delay was unreasonable

under the standards set forth in $8850.

In ruling on this case the Court is making a general rule which will apply to all persons whose vehicles are seized. The obligation of the Customs Service to act with reasonable promptness must be the same regardless of the financial circumstances of the individual involved.

Because respondent was financially able to post a bond within two weeks of the seizure and regain his vehicle does not mean that the average citizen would not suffer substantial prejudice from being deprived of his vehicle.

Respondent cannot be held to have waived his right to a prompt determination of his petition for remission by posting a bond. Respondent's submission of supplemental information can reasonably be construed as an effort to hurry the Customs Service to make it's decision.

Deprivation of a vehicle for over 30 days will, as a general rule, cause substantial prejudice via lack of mobility, loss of earning ability, and possible loss of the vehicle.

The government has at all times argued it was not bound to act reasonably or with any degree of promptness in processing the petition for remission. The government admits it did not act with any such standard in mind. Respondent's vehicle was seized over ten years ago. This $3600 litigation should be resolved in respondent's favor as a result of the government's failure to act within the requirements of the Due Process Clause.

ARGUMENT

I.

DUE PROCESS PROTECTION APPLIES TO PETITIONS FOR REMISSION UNDER 19 U.S.C. 1618.

The analysis of the Second Circuit in Johns v. McKinley, 753 F. 2d 1195 (1985) totally

rebutts petitioner's argument that the Due Process Clause does not apply to petitions for remission. The court noted that the owner of a seized automobile "was seeking to protect an existing cognizable property interest. He was the owner of the cab; and his ownership had not been extinguished by a declaration of forfeiture." (at p. 1203; emphasis added.)

The government's argument, that the petition for remission is based upon a recognition of the validity of the forfeiture and admitted culpability, is entirely unfounded. United States v. Stowell, 133 U.S. 1 (1890), relied upon by the government held only that after judicial validation, the date of the forfeiture was retroactive to the seizure, thus eliminating claims of interim bona fide purchasers. Ivers v. United States, 581 F. 2d 1362 (9th Cir. 1978) was discussed in the first United States v. Von Neumann case, 660 F. 2d 1319 (1981). Appendix B, page 27a. The court noted that: "The balance of the Ivers opinion suggests that due process does require a prompt resolution of administrative claims."

The United States Supreme Court in United States v. $8850, 461 U.S. 555 at page 557 stated:

> [T]he Customs Service generally follows the procedures governing forfeitures for violations of the customs laws, as set forth in 19 U.S.C. §§1602 et seq., and the implementing regulations. Under these procedures, the Customs Service notifies any person who appears to have an interest in the seized property of the property's liability to forfeiture and of the claimant's right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture." (emphasis added.)

The government tries to analogize the Secretary's position on a petition for remission to that of a penal authority holding a prisoner.

Petitioner not only ignores that the claimant has "an existing cognizable property interest" in the vehicle, but also that the government benefits greatly from the remission procedure. As this Court in $8850 noted at page 566:

> "An important justification for delaying the initiation of forfeiture proceedings is to see whether the Secretary's decision on the petition for remission will obviate the need for judicial proceedings. This delay can favor both the claimant and the government... Finally, a system whereby the judicial proceeding occurs after administrative action spares litigants and the government from the burden of simultaneously participating in two forums."

The Court in $8850 repeatedly recognized that seized property was only "subject to forfeiture". (See e.g. 461 U.S. at page 558, and footnote 12, at page 562.)

The government admits at page 10 of its brief:

> "The Due Process Clause applies to the deprevation of the claimant's ownership interest in the seized property, and therefore he has a right to a hearing on the question of forfeitability."

The government's argument that a petition for remission is some concession of forfeitability or a waiver of a right to contest forfeitability was expressly rejected by this Court in $8850 at page 566. The Court said: "The claimant need not waive his right to a prompt judical hearing simply because he seeks the additional remedy of an administrative petition for mitigation."

At page 17 of it's brief, the government argues that "the statute establishing the remission and mitigation remedy does not create a property interest." The government misses the point that the "property interest" exists independently of the statute. The petition for remission procedure is just one step in which it

is determined whether that property interest will be extinguished via a judical foreclosure proceeding. Respondent does not rely upon the statute to create the "existing cognizable property interest."

Respondent had a cognizable property interest in the vehicle protected by the Due Process Clause until there was an adjudication of the forfeitability of the vehicle. Until such adjudication, he was being deprived of that property interest. The Court in $8850 noted at pages 563-564:

> "While the value of allowing the government time to pursue its investigation applies to the civil forfeiture situation as well as the criminal proceedings, a major distinction exists. A suspect who has not been indicted retains his liberty; a claimant who's property has been seized, however, has been entirely deprived of the use of the property."

Due process applies to protect the claimant against unreasonable deprivation of the use of his property until such time as it is judicially determined that the claimant forfeited his interest in the property by a wrongful act.

II.

DUE PROCESS PROTECTION DOES INCLUDE THE RIGHT TO A DETERMINATION OF THE PETITION FOR REMISSION WITHIN A REASONABLY PROMPT PERIOD.

On page 10 of its brief, the government argues: "Even if due process protections do apply to the remission procedure, those protections should not include a right to a speedy disposition."

The government has not cited a single case which holds that an element of due process does not include the right to a reasonably prompt determination of the issue involving the right or property. On the contrary, the government

concedes at page 27 of it's brief: "Basically due process guarantees that a proceeding be fair; "[t]he fundamental requirement of due process is the opportunity to be heard at 'a meaningful time and in a meaningful manner'." Matthews v. Eldridge, 424 U.S. 319, 313 (1976) (quoting Armstrong v. Manza, 380 U.S. 545, 552 (1965)."

There may be a question as to the time period involved, but there is never any question that some standard of timeliness is present.

In $8850, at pages 562-563, the Court posed the question as: "when a post-seizure delay may become so prolonged that the disposed property owner has been deprived of a meaningful hearing at a meaningful time."

At pages 566-567, the Court in $8850 noted there could be "unreasonable delay in processing the administrative petition." The government's contention that because the petition for remission is subject to the Secretary's discretion on the merits, no standard applies for the time in which a decision must be made, was expressly rejected in Johns v. McKinley, F. 753 2d 1195, 1201 (2d. Cir. 1985). The court said:

> "Finally, although the matter of whether or not to grant a petition for mitigation appears to be committed to the government's unfettered discretion, and hence Johns would have no right to have the district court either compel a favorable decision or overturn the denial of his petition, we believe that factor is not dispositive of whether he had a constitutional right to a reasonably prompt decision."

Matthews v. Eldridge, supra and Cleveland Board of Education v. Loudermill, 84 L.Ed. 2d 494 (1985) are totally distinguishable from the case at bar. They both involved situations where an initial decision was made in a reasonable time. The issue in those cases was not the time of the decision made by the govern-

ment agency, but the nature of the hearing and evidence upon which the decision was based. The Court held in both cases that a prompt decision based upon an opportunity to be heard satisfied due process requirements, while a more detailed evidentuary hearing could be held subsequent to the original decision. The issue in this case does not involve the nature of the hearing or evidence to be considered by the Customs Service, but the time of the decision.

Heckler v. Day, 81 L.Ed. 2d 88 (1984) is distinguishable because the Court was relying upon "the unmistakable intention of Congress" in refusing to set mandatory judicial guidelines (at page 100). That case also involved adjudication of disputed disability claims after an initial denial. The Court noted these were "steps two and three" of the administrative process (at page 93). The petition for remission in seizure cases is the first step and the first consideration of the merits of any kind.

This Court in $8850 noted, and the government concedes, that the petition for remission is one step in the entire process by which the final rights and obligations of property owners and the government are determined in seizure cases. The petition for remission is analogous to a settlement negotiation. The property owner seeks to ascertain if the government will accept less than the total value of the property based upon his lack of moral turpitude, and in consideration of the benefit to the government in not having to initiate a judicial forclosure proceeding.

Since all parties acknowledge that the judicial forclosure proceeding will not take place before determination of the petition for remission, and since the Due Process Clause requires reasonably prompt institution of judicial forclosure proceedings, it necessarily follows that the due process right applicable to petitions for remission requires a determination with reasonable

promptness.

This Court in $8850, at page 563, rejected the government's contention that United States v. Lovasco, 431 U.S. 783 (1977) "provides the appropriate test for determining whether the delay violates the due process command." Instead, the Court said: "a more apt analogy is to a defendant's right to a speedy trial once an indictment or other formal process has issued." The Court therefore applied the four factor test of Barker v. Wingo, 407 U.S. 514 (1972).

The petition for remission and institution of judicial forfeiture proceedings are part of the same process. They determine rights in the same property, based upon the same set of facts. The Barker v. Wingo test applies to the entire process, not just the last half.

Another reason why a prompt determination is important is the claimant's right to know where he stands. The Ninth Circuit in the case at bar, and in Stypmann v. City and County of San Francisco, 557 F. 2d 1338 (1977), and the Second Circuit in Lee v. Thornton, 538 F. 2d 27 (1976), and Johns v. McKinley, supra, recognized the vital need of the individual to have use of his vehicle, and to have a prompt determination of his rights to recover his vehicle. A person whose property is seized should be able, within a reasonably prompt period of time, to make plans to resist a judicial forfeiture proceeding, or to acquire a substitute vehicle. The government claims a right to keep people in limbo for an indefinite period of time, despite it's acknowledgment at pages 33-34 of it's brief: "It is undoubtedly true that a claimant may desire a prompt ruling his remission petition, even if he has no opportunity to seek review of that decision and even if turns out to be unfavorable."

Congress directed the Secretary of Treasury in 19 U.S.C. 1618 to investigate whether a

property owner acted "without willful negligence or without any intention... to defraud... or to violate the law." The Secretary was directed by that statute to exercise his discretion in determining "the existance of such mitigating circumstances as to justify the remission or mitigation..." The Secretary was directed to act in a manner "as he deems reasonable and just..."

By this statute, Congress recognized that persons who might conduct themselves so as to subject their property to forfeiture are not subject to whim, or caprice, or arbitrary conduct of the government. The length of time which may be imposed upon the Secretary to act upon petitions for remission may be open to debate, but that some standard of reasonable promptness is required cannot be doubted.

III.

THE 36 DAY DELAY IN PROCESSING RESPONDENT'S PETITION FOR REMISSION WAS UNREASONABLE AS A MATTER OF LAW, AND THE $3600 FINE SHOULD BE RETURNED TO RESPONDENT. AT THE VERY LEAST, IT IS A QUESTION OF FACT FOR THE DISTRICT COURT TO DETERMINE WHETHER THE DELAY WAS UNREASONABLE UNDER THE STANDARDS SET FORTH IN $8850.

The government contends that the 36 day delay in processing the petition for remission was reasonable as a matter of law. The contrary is true where vehicles are concerned.

The Court in this case will pronounce a rule of law of general applicability. The Court is engaging in a rule making function, rather than merely adjudicating the merits of the case at bar. The Court must consider that the Customs Service will act in all cases under the guidelines established by its decision in this case.

Respondent, because of his financial circumstances, was able to post a bond within two weeks of the seizure and Customs returned the vehicle to him (Pet. at App. 19a). But the reasonableness of Customs acting upon a petition for remission cannot depend upon the financial means of the individual involved. Obviously, the Customs Service cannot know the financial resources of each person whose property is seized, and such a rule would deny persons equal protection under the laws depending upon their wealth.

Respondent, by posting a bond, cannot be deemed to have waived his right to a prompt resolution of his petition. Nothing in the record supports any inference that any such waiver was contemplated either by the government or respondent. Waivers of constitutional rights are not lightly implied. There is a strong presumption against against the waiver of fundamental constitutional rights. Fuentes v. Sheven, 407 U.S. 67, rehearing denied 409 U.S. 902 (1972).

The Court must make it's decision based upon the general likelihood of harm to an average citizen who may be deprived of his vehicle. Such deprivation of use can be of immense significance. In Seguin v. Eide, 720 F. 2d 1046, 1048, (9th Cir. 1984), the court noted:

> "Seguin was seventy-three years old, a partially crippled widow dependent on her car to move musical instruments necessary to her profession. We have noted elsewhere the special hardships that may result from even a short deprivation of a private automobile."

The court cited Stypmann v. City and County of San Francisco, 557 F. 2d 1338,1344 (9th Cir. 1977) and Lee v. Thornton, 538 F. 2d 27, 31 (2d Cir. 1976).

In Lee v. Thornton the court noted:

> "Deprivation of means of transportation for

such periods requires an opportunity to be heard. Moreover, the filing of a $250 bond was in insuperable obstacle to Lee, and may be too great an obstacle to many car owners seeking to force the government to proceed with forfeiture proceedings." (538 F. 2d 32)

In Johns v. McKinley, 753 F. 2d 1195, 1197, (2d Cir. 1985) the court noted:

"Johns submitted an affidavit... setting forth in greater detail the hardship Johns was suffering as a result of the delay in recovery of his cab. He stated that his contract with his employer was due to expire... and that although he would normally have anticipated no difficulty in renewing it, the delay in recovery of his cab was interfering with his performance of his obligations and could lead to the loss of his job. In addition, the delay in his return to gainful employment threatened his ability to make the installment payments due on the cab, thus creating the risk that even if the cab were eventually released by INS, a lengthy delay prior to such release might cause him to lose the cab to his finance company."

The reasonably foreseeable and likely prejudice to persons whose vehicles are seized goes beyond being stranded at a remote border point. For most people it involves an indefinite loss of mobility, loss of income, and possible loss of the vehicle itself. Vehicles are unique in this regard. A thirty day delay is "presumptively prejudicial" where a vehicle is concerned. It does not impose an unreasonable burden upon the government to act within thirty days upon petitions for remission.

The government, in it's brief at page 11 and at page 34, makes a thinly veiled threat that if this Court does not agree with its position, "the logical response for Customs would be

simply to deny all petitions that it cannot definitely determine to grant in very short order... This would place added burden on the government and the courts..." At page 34, the government says an adverse decision in this case would lead the Secretary to give "short shrift" to petitions and make "completely arbitrary decisions." Such a threat is both ignoble and empty. It ignores the government interest in avoiding the commitment of resources to judicial forclosure proceedings. It denies the Secretary's statutory responsibility to act in a "reasonable and just" manner. 19 U.S.C. 1618. This Court cannot yield to suggestions that a statutory duty will not be fulfilled if it is defined in a manner which is not pleasing to the agency.

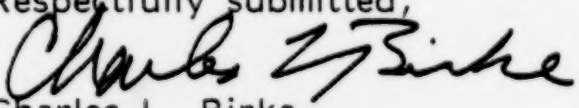
Respondent's automobile was seized on January 20, 1975, more than ten years ago. Respondent respectfully submits that he should not be required to litigate at the trial court level the issue of justification for the government's delay in processing the petition for remission. The government has at all times argued that it was not bound to act reasonably or with any degree of promptness in processing the petition for remission. The government admits it did not act with any such standard in mind. The government, at page 17 of it's brief, insists the remission procedure is one of "executive grace," despite the fact that it is established by statute and subject to due process requirements. As found by the Ninth Circuit in this case, respondent did assert his rights in the manner afforded him by the government. His submission of additional information could most reasonably be construed as an attempt to hurry the Customs Service into making a decision. Respondent suffered prejudice from uncertainty as to the status of the vehicle until respondent took it upon himself to post a bond. As noted above, the average

citizen will suffer much grevious prejudice for a much longer period. The government has never attempted to justify the delay. The affidavit submitted by the government in support of its petition for certiorari is hearsay, not part of the record, and should be disregarded. Under the balancing test of $8850, as a matter of law, respondent has been denied due process of law.

CONCLUSION

This $3600 litigation should finally come to an end. The court should direct that judgment be entered in favor of respondent for $3600 plus interest thereon from February 25, 1975, the date the balance of respondent's bond was refunded. (J.A. 18-19.)

Respectfully submitted,



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